

DRAFT
FOR DISCUSSION ONLY

UNIFORM COLLABORATIVE LAW ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Interim Draft, March 2009

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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March 10, 2009

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1 **UNIFORM COLLABORATIVE LAW ACT**

2 **PREFATORY NOTE**

3 **Overview**

4
5 This prefatory note is designed to facilitate consideration of the Uniform Collaborative
6 Law Act by:

- 7
8 • providing an overview of what collaborative law is and its growth and development;
9 • describing the public policies that support enactment of the Uniform Collaborative Law
10 Act;
11 • summarizing the act’s main provisions;
12 • discussing the major policy issues addressed during the act’s development and drafting;
13 and
14 • identifying the reasons why the Uniform Collaborative Law Act should be a uniform act.
15

16 The text of the act, with comments on specific sections, follows this prefatory note. The
17 comments address the purpose for specific sections and issues in the drafting and interpretation
18 of that section.
19

20 **Collaborative Law- Definitions and Overview**

21
22 Collaborative law is a voluntary, contractually based alternative dispute resolution
23 process for parties who seek to negotiate a resolution of their matter rather than having a ruling
24 imposed upon them by a court or arbitrator. The distinctive feature of collaborative law is that
25 parties are represented by lawyers (“collaborative lawyers”) during negotiations. Collaborative
26 lawyers do not represent the party in court, but only for the purpose of negotiating agreements.
27 The parties also agree in advance that their lawyers are disqualified from further representing
28 parties if the collaborative law process ends without agreement (“disqualification requirement”).
29 See William H. Schwab, *Collaborative Law: A Closer Look at an Emerging Practice*, 4 PEPP.
30 DISP. RESOL. L.J. 351 (2004). Parties thus retain collaborative lawyers for the limited purpose of
31 acting as advocates and counselors during the negotiation process. They have the right to
32 terminate collaborative law at any time without giving a reason.
33

34 These basic ground rules for collaborative law are set forth in a written agreement
35 (“collaborative law participation agreement”) in which parties designate collaborative lawyers
36 and agree not to seek tribunal (usually judicial) resolution of a dispute during the collaborative
37 law process. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319
38 (2004). The participation agreement also provides that if a party seeks judicial intervention, or
39 otherwise terminates the collaborative law process, the disqualification requirement takes effect.
40 *Id.* at 319-20.
41

42 Collaborative law is thus a modern method of addressing the age old dilemma for parties
43 to a negotiation of assuring that “one’s negotiating counterpart is, and will continue to be a true

1 collaborator rather than a ‘sharpie.’” Ted Schneyer, *The Organized Bar and the Collaborative*
2 *Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 290, 327 (2008).
3 Parties who sign a collaborative law participation agreement create strong incentives for
4 settlement. They must bear the costs of engaging new counsel if collaborative law terminates as
5 their collaborative lawyers must end their representation. “Each side knows *at the start* that the
6 other has similarly tied its own hands by making litigation expensive. By hiring two
7 Collaborative Law practitioners, the parties send a powerful signal to each other that they truly
8 intend to work together to resolve their differences amicably through settlement.” .” Scott R.
9 Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 133 (emphasis in original).

10
11 The goal of creating these incentives for settlement is to encourage parties and their
12 collaborative lawyers to focus on problem solving rather than positional negotiations. *See*
13 *generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT
14 WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991). Signing a collaborative law participation
15 agreement identifies lawyers and clients who want to emphasize problem solving in discussions
16 with other parties and ties them to that process with sanctions for failing to settle.

17
18 There are many different models of collaborative law practice that build on the core
19 feature of the disqualification requirement. *See* John Lande, *Possibilities for Collaborative Law:*
20 *Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of*
21 *Lawyering*, 64 OHIO ST. L.J. 1315 (2003). Most collaborative law participation agreements, for
22 example, require parties to voluntarily disclose relevant data requested by another party without
23 formal discovery requests and to supplement responses to information requests previously made.
24 Additional provisions in many agreements require parties to jointly retain neutral experts rather
25 than hire their own. Sometimes, collaborative law participation agreements require that
26 negotiations take place in four-way meetings in which counsel and parties focus on their
27 underlying interests, share information and “brainstorm” solutions to problems. Typically, in
28 order to promote problem solving negotiations, collaborative law participation agreements
29 provide that communications during the collaborative law process are confidential and cannot be
30 introduced as evidence in court. N.Y. ASS’N OF COLLABORATIVE PROF’LS: COLLABORATIVE LAW
31 PARTICIPATION AGREEMENT, available at
32 http://collaborativelawny.com/participation_agreement.php; TEX. COLLABORATIVE LAW
33 COUNCIL: PARTICIPATION AGREEMENT (2005).

34 35 **Collaborative Law’s Growth and Development**

36
37 Collaborative law builds on the venerable tradition of the lawyer as counselor, and the
38 more recent growth and development of alternative dispute resolution in the legal community.
39 Lawyers have long productively advised clients to consider the benefits of settlement and the
40 costs of continued conflict. For example, Abraham Lincoln in 1850 in his *Notes for a Law*
41 *Lecture* advised young lawyers:

42
43 “Discourage litigation. Persuade your neighbors to compromise whenever you can.
44 Point out to them how the nominal winner is often a real loser—in fees, expenses and
45 waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good
46 man. There will still be business enough.” ABRAHAM LINCOLN, LIFE AND WRITINGS OF

1 ABRAHAM LINCOLN 329 (Philip V. D. Stern ed., 1940).

2
3 The bar formally recognizes the lawyer’s role as counselor articulated by Lincoln in the *Model*
4 *Rules of Professional Conduct*. Model Rule 1.4 provides that “[a] lawyer should exert best
5 efforts to ensure that decisions of the client are made only after the client has been informed of
6 relevant considerations. A lawyer ought to initiate this decision-making process if the client
7 does not do so A lawyer should advise the client of the possible effect of each legal
8 alternative” MODEL RULES OF PROF’L CONDUCT R. 1.4 (2002). Model Rule 2.1 provides
9 that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as
10 moral, economic, social and political factors, that may be relevant to the client’s situation.”
11 MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002). Comment [2] to Model Rule 2.1 amplifies the
12 sentiment by stating that “[a]dvice couched in narrow legal terms may be of little value to a
13 client, especially where practical considerations, such as cost or effects on other people, are
14 predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper
15 for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a
16 lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal
17 questions and may decisively influence how the law will be applied.” MODEL RULES OF PROF’L
18 CONDUCT R. 2.1 cmt. [2] (2002)

19
20 Lawyers have also come to value alternative dispute resolution processes such as
21 mediation and arbitration that create mechanisms where clients can resolve disputes with less
22 economic and emotional cost than through litigation. *See generally* JULIE MCFARLANE, THE NEW
23 LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (2008). In 1976, 200
24 judges, scholars, and leaders of the bar gathered at the Pound Conference convened by the
25 American Bar Association to examine concerns about the efficiency and fairness of the court
26 systems and dissatisfaction with the administration of justice. Then Chief Justice Warren Burger
27 called for exploration of informal dispute resolution processes. The Pound Conference
28 emphasized ADR processes – particularly mediation – as better for litigants who had continuing
29 relationships after the trial was over because it emphasized their common interests rather than
30 those that divided them. Professor Frank Sander, Reporter for the Pound Conference’s follow-up
31 task force, projected a powerful vision of the court as not simply “a courthouse but a dispute
32 resolution center where the grievant, with the aid of a screening clerk, would be directed to the
33 process (or sequence of processes) most appropriate to a particular type of case.” Frank E. A.
34 Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

35
36 Today, approximately 40 years after the Pound Conference, alternative dispute resolution
37 has been fully integrated into the dispute resolution systems of most jurisdictions. *See*
38 LexisNexis 50 State Comparative Legislation/ Regulations: Alternative Dispute Resolution
39 (March 2008), available at <http://w3.lexis.com/lawschoolreg/researchlogin08.asp?t=y&fac=no>.
40 All 50 states have combined to adopt 186 alternative dispute resolution statutes or regulations,
41 including: ARIZ. REV. STAT. § 10-1806 (2008) (Close Corporations-Settlement of Disputes-
42 Arbitration); CAL. BUS. & PROF. CODE § 465 (2007) (Department of Consumer Affairs dispute
43 resolution programs); COL. REV. STAT. § 13-22-201 (2007) (Courts and Procedure; Arbitration
44 Proceedings); FLA. STAT. ANN. § 455.2235 (2007) (Business and Professional Regulation:
45 General Provisions; Mediation); WASH. REV. CODE. ANN. § 7.06.010 (2008) (Mandatory
46 Arbitration of Civil Actions).

1
2 In many states lawyers are required to present clients with alternative dispute resolution
3 options- mediation, expert evaluation, arbitration- in addition to litigation. California,
4 Connecticut, Georgia, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Texas and
5 Virginia impose mandatory duties on attorneys to discuss alternatives to litigation with their
6 clients via court rule. *See* N.J. CT. R. 5:4-2(h); Marshall J. Berger, *Should An Attorney Be*
7 *Required Be Required to Advise a Client of ADR Options*, 13 GEO. J. LEGAL ETHICS 427,
8 Appendix I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions);
9 Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil*
10 *Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401 (2002); Bobbi McAdoo & Art
11 Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney*
12 *Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473
13 (2002) (empirical studies analyzing the impact of rules requiring lawyers to discuss ADR with
14 clients).

15
16 Collaborative law is a natural merger of the tradition of lawyer as counselor with the
17 bar's successful experience with alternative dispute resolution. The concept of collaborative law
18 was first described by Minnesota lawyer Stu Webb approximately eighteen years ago in the
19 context of representation in divorce proceedings, the leading subject area for collaborative law
20 practice today. Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering 'Family*
21 *Law Burnout*, 18 MATRIM. STRATEGIST 7 (2000). Since then, collaborative law has matured and
22 emerged as a viable option on the continuum of choices available to parties to resolve a matter.
23 Examples of its growth and development include:

- 24
- 25 • Roughly 22,000 lawyers worldwide have been trained in collaborative law. Telephone
26 Interview by Ashley Lorance with Talia Katz, Executive Director, International Academy of
27 Collaborative Professionals (Feb. 17, 2009); Christopher M. Fairman, *A Proposed Model*
28 *Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 83 at n.65 (2005) (citing
29 Jane Gross, *Amicable Unhitching, With a Prod*, N.Y. TIMES, May 20, 2004, at F11).
 - 30
 - 31 • Collaborative law has been used to resolve thousands of cases in the United States, Canada,
32 and elsewhere. David A. Hoffman, *Collaborative Law: A Practitioner's Perspective*, 12
33 DISP. RESOL. MAG. 25 (Fall 2005).
 - 34
 - 35 • The International Association of Collaborative Professionals (IACP), the umbrella
36 organization for collaborative lawyers, has more than 2,600 lawyer members. Telephone
37 Interview by Ashley Lorance with Talia Katz, Executive Director, International Academy of
38 Collaborative Professionals (Feb. 17, 2009).
 - 39
 - 40 • Collaborative law practice associations and groups have been organized in virtually every
41 state in the nation and in several foreign jurisdictions. *See* Int'l Acad. Collaborative Prof'ls.,
42 <http://www.collaborativepractice.com> (follow "Find a Collaborative Professional" hyperlink)
43 (last visited Aug. 1, 2007).
 - 44
 - 45 • A number of states have enacted statutes of varying length and complexity which recognize
46 and authorize collaborative law. *See, e.g.*, CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT.

1 §§ 50-70 to -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006).
2

- 3 • A number of courts have taken similar action through enactment of court rules. *See, e.g.,*
4 MINN. R. GEN. PRAC. 111.05 & 304.05 (2008); SUPER. CT. CONTRA COSTA COUNTY, LOCAL
5 RULES, RULE 12.8, (2007); L.A. COUNTY SUPERIOR COURT RULE 14.26 (2005); LRSF 11.17
6 (2009); SONOMA COUNTY LOCAL RULE 9.25 (2005); UTAH CODE OF JUDICIAL
7 ADMINISTRATION, RULE 4-510 (2006); LA. CODE R. tit. IV, § 3 (2005).
8
- 9 • The first empirical research on collaborative law found generally high levels of client and
10 lawyer satisfaction with the process and that negotiation under collaborative law participation
11 agreements is more problem solving and interest based than those in the more traditional
12 adversarial framework. It found no evidence that “weaker” parties fared worse in
13 collaborative law than in adversarial based negotiations. JULIE MACFARLANE, THE EMERGING
14 PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL
15 CASES (June 2005) (Can.), *available at* [http://www.justice.gc.ca/eng/pi/pad-rpad/rep-
rap/2005_1/2005_1.pdf](http://www.justice.gc.ca/eng/pi/pad-rpad/rep-
rap/2005_1/2005_1.pdf) (last visited Feb. 12, 2009). *See also* Julie Macfarlane, *Experiences*
17 *of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research*
18 *Project*, 2004 J. DISP. RESOL. 179.
19
- 20 • Former Chief Judge Judith S. Kaye of New York established the first court based
21 Collaborative Family Law Center in the nation in New York City. In announcing the Center,
22 Chief Judge Kaye stated: “[w]e anticipate that spouses who choose this approach will find that
23 the financial and emotional cost of divorce is reduced for everyone involved—surely a step in the
24 right direction.” JUDITH S. KAYE, 2007 THE STATE OF THE JUDICIARY 11 (New York State
25 Office of Court Administration 2007).
26
- 27 • The American Bar Association Dispute Resolution Section has organized a Committee on
28 Collaborative Law. Section of Dispute Resolution: Collaborative Law Committee, *available*
29 *at*, <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited Aug. 1, 2007).
30 The Collaborative Law Committee has an active Ethics Subcommittee engaged in the
31 codification of the standards of practice for collaborative lawyers. American Bar Ass’n,
32 Section on Dispute Resolution, Collaborative Law Committee, Ethics Subcommittee,
33 Summary of Ethics Rules Governing Collaborative Law (Draft Aug. 2, 2008);
34
- 35 • Collaborative law is developing worldwide. Canada, Australia, the United Kingdom, New
36 Zealand, France, Germany, Austria, Switzerland, the Czech Republic, Israel and Uganda all
37 report collaborative law activity. Robert Miller, *How We Can All Get Along*, DALLAS
38 MORNING NEWS, September 3, 2008, at 2D. For example:
39
 - 40 ○ Collaborative law has grown rapidly in Canada since its introduction in 2000—from
41 75 lawyers trained in collaborative practice to more than 2,800 in 2009. Susan Pigg,
42 *Collaboration, Not Litigation; Many Divorcing Couples Are Sitting Down Together,*
43 *Along With Their Lawyers, To Hammer Out Agreements*, TORONTO STAR, Jan. 28,
44 2009, at L01.
45

- 1 ○ Despite only being introduced to Australia in 2005, collaborative law has experienced
2 rapid growth. COLLABORATIVE PRACTICE IN FAMILY LAW: A REPORT TO THE
3 ATTORNEY-GENERAL BY THE FAMILY LAW COUNCIL, (Australia Family Law Council
4 ed., 2006). The Family Law Council Report, released by Attorney-General Philip
5 Ruddock in April 2007, said that collaborative law had the potential to deliver
6 ongoing benefits to the public. Sue Purdon, *Divorcing With Dignity*, COURIER MAIL
7 (Austl.), April 13, 2007, at 26. About 400 lawyers have been trained in collaborative
8 law from 2005 to 2007. *Id.*
9
- 10 ○ Collaborative Law was formally launched in the United Kingdom in London in
11 November of 2006. *Id.* Britain’s leading family judges and lawyers began a formal
12 campaign to encourage divorcing couples to participate in collaborative law. Frances
13 Gibb, *Family Judges Campaign to Take the Bitterness and Cost Out of Divorce*,
14 TIMES ONLINE Oct. 4, 2007 ([http://business.times](http://business.timesonlink.co.uk/tol/business/law/public_law/article2584817.ece)
15 [onlink.co.uk/tol/business/law/public_law/article2584817.ece](http://business.timesonlink.co.uk/tol/business/law/public_law/article2584817.ece)). About 600 lawyers
16 practice collaborative law in England and Wales, 60 in Scotland and 60 in Northern
17 Ireland as of November 2006. Clare Dyer, *Round-Table Divorce is Faster, Cheaper*
18 *and Friendlier*, GUARDIAN (London) November 27, 2006, at 14.
19
- 20 ○ As of May 2008, about 600 Irish lawyers have been trained in collaborative law.
21 Carol Coulter, *New Form of Law Aims to Meet Eider Human Needs*, IRISH TIMES,
22 May 5, 2008 at 4. When Ireland hosted the second European Collaborative Law in
23 May 2008 the Republic of Ireland’s President, Mary McAleese, announced that
24 collaborative law was the preferred method of dispute resolution in Ireland. Robert
25 Miller, *How We Can All Get Along*, DALLAS MORNING NEWS, September 3, 2008, at
26 2D.
27
- 28 ● Many professionals from other disciplines, especially financial planning and psychology,
29 have been trained to participate in collaborative law. *See Tesler, supra* at 5.
30
- 31 ● Numerous articles have been written about collaborative law in scholarly journals, *See, e.g.,* ,
32 *See, e.g.,* Schneyer, *supra*; Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP.
33 RESOL. 131; Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and*
34 *the Challenge of Ethics*, 30 CAMPBELL L. REV. 237 (2008); Michaela Keet, et al., *Client*
35 *Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145 (2008); Forrest S. Mosten,
36 *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*,
37 2008 J. DISP. RESOL. 163; Stu Webb, *Collaborative Law: A Practitioner’s Perspective on Its*
38 *History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW 155 (2008); Lawrence P.
39 McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid*
40 *Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465; Brian Roberson,
41 *Let’s Get Together: An Analysis of the Applicability of the Rules of Professional Conduct to*
42 *Collaborative Law*, 2007 J. DISP. RESOL. 255; John Lande, *Principles for Policymaking about*
43 *Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007);
44 Gary L. Vogel, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool for*
45 *the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971
46 (2007); Elizabeth K. Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description:*

1 *Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979 (2006);
2 Joshua Issacs, *Current Developments, A New Way to Avoid the Courtroom: The Ethical*
3 *Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833 (2005); Scott R.
4 Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal*
5 *Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005); Gay
6 G. Cox & Robert J. Matlock, *Problem Solving Process: Peacemakers and the Law: The Case*
7 *for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45 (2004); Sherri Goren Slovin, *The*
8 *Basics of Collaborative Family Law – A Divorce Paradigm Shift*, 18 AM. J. FAM. L. 2
9 (Summer 2004) available at <http://www.mediate.com/articles/slovinS2.cfm>; Larry R. Spain,
10 *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be*
11 *Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141 (2004); John Lande
12 & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative*
13 *Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); John
14 Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification*
15 *and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003);
16 Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New*
17 *Heads*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003); James K. L. Lawrence, *Collaborative*
18 *Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431
19 (2002); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*,
20 PSYCHOL. PUB. POL'Y. & L. 967 (1999).

- 21
- 22 • Numerous articles have also been written about collaborative law in the popular press. *See,*
23 *e.g.*, Numerous articles have also been written about collaborative law in the popular press.
24 *See, e.g.*, Susan Pigg, *Collaboration, Not Litigation: Many Divorcing Couples Are Sitting*
25 *Down Together, Along with Their Lawyers, to Hammer Out Agreements*, TORONTO STAR,
26 Jan. 28, 2009, at L01; Carol Coulter, *Non-Adversarial System 'Will Replace the Courts' to*
27 *Resolve Family Law Disputes*, IRISH TIMES, May 3, 2008, at 8; Rosanne Michie, *Curing a*
28 *Splitting Headache*, HERALD SUN (Austl.), Feb. 25, 2008 at 30; Jon Robins, *At Last: A*
29 *Divorce Process for Adults: Ending a Marriage Often Means a Bitter Battle in the Courts.*
30 *But a New Scheme Could Ease the Emotional and Financial Pain, Says Jon Robins,*
31 *OBSERVER (Eng.)*, Dec. 30, 2007, at 12; Melissa Harris, *Same Split with a Lot Less Spat:*
32 *Howard Teams Guide Collaborative Divorce*, BALTIMORE SUN, Oct. 5, 2007, at 1A; Mary
33 Flood, *Collaborative Law Can Make Divorces Cheaper, Civilized*, HOUS. CHRON., June 05,
34 2007; Clare Dyer, *Round-Table Divorce Is Faster, Cheaper and Friendlier*, GUARDIAN
35 (London) Nov. 27, 2006, at 14; *The Today Show* (NBC television broadcast Jan. 17, 2006)
36 (Ann Curry interviews collaborative lawyers and collaborative clients about collaborative
37 divorce), available at http://www.collaborativelawny.com/today_show.php; Michelle Conlin,
38 *Good Divorce, Good Business: Why More Husband-and-Wife-Teams Keep Working*
39 *Together After They Split*, BUS. WK., Oct. 31, 2005, at 90; Katti Gray, *Collaborative Divorce:*
40 *There's a Kinder, Simpler – and Less Expensive – Way to Untie the Knot*, NEWSDAY, Aug.
41 15, 2005, at B10; Carla Fried, *Getting a Divorce? Why It Pays to Play Nice: Collaborative*
42 *Divorce Offers Splitting Spouses a Kinder, Less Expensive Way to Say "I Don't*, MONEY,
43 July, 2005, at 48; Janet Kidd Stewart, *Collaboration Is Critical: Couples Find That Breaking*
44 *Up Doesn't Have to Mean Breaking the Bank*, CHI. TRIB., Feb. 9, 2005 at 3; Jane Gross,
45 *Amicable Unhitching, with a Prod*, N.Y. TIMES, May 20, 2004, at F11.
- 46

1 **Uniform Collaborative Law Act - An Overview**
2

3 The overall goal of the Uniform Collaborative Law Act is to encourage the continued
4 development and growth of collaborative law as a voluntary dispute resolution option.
5 Collaborative law has thus far largely been practiced under the auspices of private collaborative
6 law participation agreements developed by private practice groups. These agreements vary
7 substantially in depth and detail, and their enforcement must be accomplished by actions for
8 breach of contract.
9

10 The Uniform Collaborative Law Act aims to standardize the most important features of
11 collaborative law participation agreements both to protect consumers and to make party entry
12 into collaborative law easier. It mandates essential elements of a process to facilitate informed
13 consent for parties who sign participation agreements. The act also aims to facilitate
14 collaborative law by making its key features, the disqualification provision and voluntary
15 disclosure of information mandated provisions of participation agreements. Finally, the act
16 creates an evidentiary privilege for collaborative law communications to facilitate candid
17 discussions during the collaborative law process.
18

19 Specifically, the Uniform Collaborative Law Act:
20

- 21 • establishes minimum requirements for collaborative law participation agreements,
22 including written agreements, description of the matter submitted to collaborative law
23 and designation of collaborative lawyers (section 3);
24
- 25 • specifies when and how collaborative law begins and is terminated (section 4);
26
- 27 • creates a stay of proceedings when collaborative law is used to attempt to resolve
28 proceedings pending before a tribunal while allowing the tribunal to ask for periodic
29 status reports (section 5);
30
- 31 • creates an exception to the stay of proceedings created by collaborative law for
32 emergency orders to protect health, safety or welfare of a party, a family member or a
33 dependent (section 6);
34
- 35 • authorizes tribunals to approve settlements arising out of collaborative law (section 7);
36
- 37 • extends the disqualification requirement if collaborative law terminates to matters
38 “substantially related” to that submitted to collaborative law and to lawyers in a law firm
39 associated with a collaborative lawyer, (section 8);
40
- 41 • creates an exception to the disqualification requirement for the lawyers in a law firm
42 associated with the collaborative lawyer if the collaborative lawyer represents low
43 income parties for no fee and is screened from further participation in the matter (section
44 9);
45

- 1 • creates a similar exception for collaborative lawyers for government agencies (section
2 10);
- 3
- 4 • requires parties to a collaborative law participation agreement to voluntarily disclose
5 relevant information during the collaborative law process without formal discovery
6 request (section 11);
- 7
- 8 • requires that lawyers disclose and discuss the material risks and benefits of collaborative
9 law as compared to other dispute resolution processes such as litigation, mediation and
10 arbitration to help insure parties enter into collaborative law participation agreements
11 with informed consent (section 12);
- 12
- 13 • creates an obligation on collaborative lawyers to screen clients for domestic violence and,
14 if present, to participate in collaborative law only if the victim consents and the lawyer is
15 reasonably confident that the victim will be safe (section 12);
- 16
- 17 • meets the reasonable expectations of parties and counsel for confidentiality of
18 communications during the collaborative law process by creating an evidentiary privilege
19 for such communications (section 13);
- 20
- 21 • provides for possibility of waiver of and limited exceptions to the evidentiary privilege
22 based on important countervailing public policies such as the protection of bodily
23 integrity and crime prevention identical to those recognized for mediation
24 communications in the Uniform Mediation Act (sections 14, 15, 16)*;
- 25
- 26 • gives tribunals discretion to enforce agreements that result from collaborative law, the
27 disqualification requirement and the evidentiary privilege provisions of the act, despite
28 the lawyers' mistakes in required disclosures before collaborative law participation
29 agreements are executed and in the written participation agreements themselves (section
30 17); and
- 31
- 32 • acknowledges that standards of professional responsibility and child abuse reporting for
33 lawyers and other professionals are not changed by their participation in collaborative
34 law (section 18).

*The Drafting Committee for the Uniform Collaborative Law Act gratefully acknowledges a major debt to the drafters of the Uniform Mediation Act. The drafting of the Uniform Mediation Act required the National Conference of Commissioners on Uniform State Laws to comprehensively examine a dispute resolution process serving many of the same goals as collaborative law, and ask what a statute could do to facilitate the growth and development of that process. Many of the issues involved in the drafting of the Uniform Collaborative Law Act, particularly those involving the scope of evidentiary privilege, are virtually identical to those that had to be resolved in the drafting of the Uniform Mediation Act. As a result, some of the provisions and the commentary in this act are taken verbatim or with slight adaptation from the Uniform Mediation Act. To reduce confusion, those provisions are presented here without quotation marks or citations, and edited for brevity and with insertions to make them applicable to collaborative law.

1 Collaborative Law's Public Policy Benefits

2
3 The Uniform Collaborative Law Act's goal is to make collaborative law more broadly
4 and uniformly available and thus give parties another voluntary option for dispute resolution.
5 Making more responsible consensual dispute resolution options available to parties increases the
6 likelihood that their disputes will be resolved short of trial, earlier in their life cycle, at less
7 economic and emotional cost and with greater long range satisfaction. *See generally* Report of
8 the Ad Hoc Panel on Disp. Resol. & Pub. Pol'y, Nat'l Inst. of Disp. Resol., *Paths to Justice:
9 Major Public Policy Issues of Dispute Resolution* (1983), reprinted in LEONARD L. RISKIN &
10 JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3-4 (2d ed. 1997); Nancy H. Rogers
11 & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage
12 Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 838 (1998).

13
14 Society benefits when parties voluntarily participate in dispute resolution options that
15 help them resolve their conflicts earlier and result in greater respect for and satisfaction in the
16 process that led to the resolution. Earlier settlements can reduce the disruption that a dispute can
17 cause in the lives of parties and others affected by the dispute. *See* JEFFREY RUBIN, DEAN PRUITT
18 & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* 68-116 (2d ed.
19 1994) (discussing reasons for and consequences of conflict escalation). When settlement is
20 reached earlier, personal and societal resources dedicated to resolving disputes can be invested in
21 more productive ways. Earlier settlement also diminishes the unnecessary expenditure of
22 personal and institutional resources for conflict resolution, and promotes a more civil society.
23 TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005) ("It is the policy of this state to
24 encourage the peaceable resolution of disputes... and the early settlement of pending litigation
25 through voluntary settlement procedures."); *See also* Wayne D. Brazil, *Comparing Structures for
26 the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP.
27 RESOL. 715 (1999); Robert K. Wise, *Mediation in Texas: Can the Judge Really Make Me Do
28 That?*, 47 S. TEX. L. REV. 849, 850 (Summer 2006). *See generally* ROBERT D. PUTNAM,
29 *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing
30 the causes for the decline of civic engagement and ways of ameliorating the situation).

31
32 Parties who participate in consensual dispute resolution processes like collaborative law
33 have a more positive view of the justice system and are more likely to comply with agreements
34 reached. Consensual dispute resolution gives parties the greatest opportunities for participation
35 in determining the outcome of the process, allows self-expression, and encourages
36 communication. Robert A. Baruch Bush, "What do We Need a Mediator for?": *Mediation's
37 "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 21 (1996). Parties value the
38 self-determination inherent in consensual dispute resolution, as they believe they know what is
39 best for themselves and want to be able to incorporate that understanding into settlement of their
40 disputes. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and
41 Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253,
42 267-268 (1989). Parties usually prefer consensual processes to resolution of disputes by court
43 order, even if they result in unfavorable outcomes. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL
44 PSYCHOLOGY OF PROCEDURAL JUSTICE*, 97 (1988). They see consensual processes as
45 subjectively fairer than adversarial dispute resolution. *Id.* at 206-217. Consensual dispute
46 resolution encourages not only a feeling that a process is fair, but also enhances the relationships

1 underlying conflict. Parties who participate in consensual dispute resolution feel a commitment
2 to the agreement they have come to and to the other party in the conflict and are more likely to
3 comply with that agreement as compared to one imposed on them. *See generally* TOM R. TYLER,
4 WHY PEOPLE OBEY THE LAW (1990).

5
6 Not all disputes can or should be resolved through negotiation and compromise
7 encouraged by collaborative law. Litigation and judicial determinations serve vital social
8 purposes. Courts provide a measure of predictability in outcome by application of precedent and
9 procedures rooted in due process. They articulate, apply and expand principals of law necessary
10 to provide order to social and economic life. They resolve factual conflicts through the time
11 tested procedures of the adversary system. Courts can require disclosure of information that one
12 side wants to keep from the other. Courts can issue orders backed by sanctions that protect the
13 vulnerable and weak against the manipulative and powerful. These benefits of the judicial
14 process are generally not available when settlements occur through private, confidential
15 processes such as collaborative law. *See* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073
16 (1984).

17
18 The benefits of court imposed resolution of disputes through litigation are not, however,
19 without costs. Lincoln alluded to them by noting that “the nominal winner [in litigation] is often
20 a real loser—in fees, expenses and waste of time.” Parties can find litigation to be emotionally
21 and economically draining. Judge Learned Hand, in his customarily succinct style, summarized
22 the consequences of full fledged adversary litigation for many by stating that “[a]s a litigant I
23 should dread a lawsuit beyond almost anything else short of sickness and death.” Learned Hand,
24 *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89,
25 105 (1926). *See* Robert H. Heidt, *When Plaintiffs Are Premium Planners For Their Injuries: A*
26 *Fresh Look At The Fireman’s Rule*, 82 IND. L.J. 745, 769 (2007) (referring to Judge Learned
27 Hand’s quote while discussing the benefit of the fireman’s rule, how it avoids substantial
28 litigation, refers to litigation as “toxic and protracted” in character, noting that “incessant
29 wrangling will leave professional rescuers and defendants “dispirited” and may stretch on for
30 years, leaving the parties and witnesses bitter, stressed, and frustrated); Andrew S. Boutros &
31 Jeffrey O’Connell, *Treating Medical Malpractice Claim Under A Variant Of The Business*
32 *Judgment Rule*, 77 NOTRE DAME L. REV. 373, 420 (2002) (referring to Judge Learned Hand’s
33 quote while discussing the benefit of prompt settlement to personal injury tort claims, including
34 those arising from medical malpractice). Parents in divorce and family disputes in particular have
35 negative reactions to litigation as a method of resolving family problems. ANDREW I. SCHEPARD,
36 CHILDREN COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 42-44
37 (2004).

38
39 The overall question for social policy is not how to eliminate litigation. Rather, it is how
40 to authorize and develop responsible alternatives to it so that parties can decide for themselves if
41 the costs of litigation outweigh its benefits in their particular circumstances. The greater the
42 range of dispute resolution options that parties have for “fitting the forum to the fuss,” the better.
43 John Lande & Gregg Herman, *supra* at 7.

44
45 Collaborative law should be an attractive dispute resolution option for many parties,
46 especially those who wish to maintain post dispute relationships with each other and minimize

1 the costs of dispute resolution. Parties may prefer it to traditional full service representation by
2 lawyers because of its incentives to work hard to compromise and because the disqualification
3 provision encourages parties to take the risk of disclosing information that might be helpful to
4 settlement but could jeopardize the chances of prevailing in court.

5
6 As compared to a trial both collaborative law and mediation offer parties the benefits of
7 private, confidential negotiations, the promise of cost reduction and the potential for better
8 relationships. Both mediation and collaborative law encourage voluntary disclosure and an ethic
9 of fair dealing between parties. Parties in both mediation and collaborative law are likely to
10 experience greater voice in the process of settlement than in a judicial resolution and are more
11 likely to be satisfied as a result. *See* Chris Guthrie & James Levin, *A “Party Satisfaction”*
12 *Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

13
14 Mediation and collaborative law, however, do have differences that might make one
15 process more or less attractive to parties. For example, in many states parties do not have the
16 protection of mediators being a licensed and regulated profession. Lawyers are. Mediators, as
17 neutrals, cannot, however, give candid legal advice to a party while collaborative lawyers can.
18 Mediators, as neutrals, are also constrained in redressing imbalances in the knowledge and
19 sophistication of parties. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard
20 IIB (2005) (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that
21 gives the appearance of partiality”); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE
22 MEDIATION Standard IV (2000) (“A family mediator shall conduct the mediation process in an
23 impartial manner”); RULES OF THE CHIEF ADMINISTRATIVE JUDGE § 146. 2008 – 31 NY Reg. 93
24 (July 31, 1008) (detailing the neutrality requirement for mediators in New York). Despite their
25 limited purpose function of negotiating a resolution of a dispute, collaborative lawyers are
26 advocates for their clients.

27
28 These kinds of considerations might make parties opt for collaborative law over full
29 service representation or mediation for resolution of their dispute. The Uniform Collaborative
30 Law Act goal is to make that option more available for them.

31 **Collaborative Law and the Legal Profession**

32
33
34 The further growth and development of collaborative law also has significant benefits for
35 the legal profession. Collaborative law is part of the movement towards delivery of “unbundled”
36 or “discreet task” legal representation, as it separates by agreement representation in settlement-
37 oriented processes from representation in pretrial litigation and the courtroom. By increasing the
38 range of options for services that lawyers can provide to clients, unbundled legal services
39 reduces costs and increases client satisfaction with the services provided. The organized bar has
40 recognized unbundled services like collaborative law as a useful part of the lawyer’s
41 representational options. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002); FOREST S.
42 MOSTEN, UNBUNDLED LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE
43 (Am. Bar Ass’n 2000). *See generally* Symposium, *A National Conference on Unbundled Legal*
44 *Services October 2000*, 40 FAM. CT. REV. 26 (2002); Franklin R. Garfield, 40 FAM. CT. REV. 76,
45 *Unbundling Legal Services in Mediation* (2002); Robert E. Hirshon, *Unbundled Legal Services*
46 *and Unrepresented Family Litigants, Papers from the National Conference on Unbundling*, 40

1 FAM. CT. REV. 13 (2002); Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10 (2002);
2 Andrew Schepard, *Editorial Notes*, 40 FAM. CT. REV. 5 (2002).

3
4 Additionally, collaborative law has an intangible benefit for the lawyers who practice it-
5 greater satisfaction in the profession they have chosen. Susan Daicoff, *Lawyer, Be Thyself: An*
6 *Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling*
7 *Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL'Y & L. 87, 133 (2008).
8 Collaborative lawyers generally feel that the collaborative law process enables them to work
9 productively with other professions (particularly with mental health experts and financial
10 planners) in service to parties. Janet Weinstein, *Coming of Age: Recognizing the Importance of*
11 *Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 337-38 (1999). Instead of
12 using these professionals in an adversarial framework as expert witnesses or consultants to
13 further their "case", collaborative lawyers draw on their expertise to help shape creative
14 negotiations and settlements. Elizabeth Tobin Tyler, *Allies, Not Adversaries: Teaching*
15 *Collaboration to the Next Generation of Doctors and Lawyers to Address Inequality*, 11 J.
16 HEALTH CARE L. & POL'Y 249, 272-73 (2008).

17
18 More globally, collaborative lawyers feel they help their clients resolve their disputes
19 productively, thus fulfilling Lincoln's inspirational vision of the lawyer "as a peacemaker" with
20 the "superior opportunity of being a good man [or woman]" for whom "[t]here will still be
21 business enough." The professional satisfaction of the collaborative lawyer's role may have best
22 been summed up nearly one hundred years after Lincoln wrote by another great figure who was
23 also a practicing lawyer, Mohandas Gandhi. Gandhi served as a lawyer for the South African
24 Indian community before he returned to India to lead its fight for independence. Reflecting on
25 his experience encouraging a settlement by a client of a commercial dispute, Gandhi wrote:

26
27 "My joy was boundless. I had learnt the true practice of law. I had learnt to find out the
28 better side of human nature and to enter men's hearts. I realized the true function of a
29 lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that
30 a large part of my time during the twenty years of my practice as a lawyer was occupied
31 in bringing about private compromises of hundreds of cases. I lost nothing thereby - not
32 even money, certainly not my soul." MOHANDAS GANDHI, AN
33 AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 168
34 (1948).

35 36 **Collaborative Law, Professional Responsibility and Training Requirements**

37
38 The act assumes that the limited scope representation provided by collaborative lawyers
39 is consistent with standards of professional responsibility for lawyers. Numerous bar association
40 ethics committees have concluded collaborative law is generally consistent with the *Model Rules*
41 *of Professional Conduct*. See Advisory Comm. of the Supreme Court of Missouri, Formal Op.
42 124 (2008), "Collaborative Law," available at [www.mobar.org/data/esq08/aug22/formal-](http://www.mobar.org/data/esq08/aug22/formal-opinion.htm)
43 [opinion.htm](http://www.mobar.org/data/esq08/aug22/formal-opinion.htm); N. J. Advisory Comm. on Prof'l Ethics. Op. 699 (2005), "Collaborative Law,"
44 available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; Kentucky Bar
45 Ass'n Op. E-425 (2005), "Participation in the 'Collaborative Law' Process," available at
46 http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; Pennsylvania Bar Ass'n

1 Comm. on Legal Ethics and Prof'l Responsibility Inf. Op. 2004-24 (2004), *available at* [http://](http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf)
2 www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf; North Carolina State Bar
3 Ass'n Formal Ethics Op. 1 (2002), "Participation in Collaborative Resolution Process Requiring
4 Lawyer to Agree to Limit Future Court Representation," *available at*
5 <http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/2002&to=4/2002>. As one
6 commentator has noted, "the mainstream response [of the organized bar] has for the most part
7 accepted [collaborative law], at least as a worthwhile experiment." Schneyer, *supra*, 50 ARIZ. L.
8 REV. at 292.

9
10 Only one state bar ethics opinion concluded to the contrary, arguing that when
11 collaborative lawyers sign a collaborative law participation agreement with parties, they assume
12 contractual duties to other parties besides their client, creating an intolerable conflict of interest.
13 Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007); "Ethical Considerations in the Collaborative
14 and Cooperative Law Contexts," *available at* [http://](http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth)
15 www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth, Colorado's unique view has,
16 however, been specifically rejected by American Bar Association Formal Op. 07-447 *Ethical*
17 *Considerations in Collaborative Law Practice* (2007). The ABA Opinion concluded that
18 collaborative law is a "permissible limited scope representation," the disqualification provision is
19 "not an agreement that impairs her ability to represent the client, but rather is consistent with the
20 client's limited goals for the representation" and "[i]f the client has given his or her informed
21 consent, the lawyer may represent the client in the collaborative law process."

22
23 To avoid any possible confusion, section 18 of the UCLA explicitly states the act does
24 not change the professional responsibility obligations of collaborative lawyers. Indeed, in some
25 states, changing the professional responsibility obligations of lawyers could be beyond the scope
26 of legislative authority, as that power is reserved to the judiciary. *State ex rel. Fiedler v.*
27 *Wisconsin Senate*, 155 Wis.2d 94, 454 N.W.2d 770 (Wis. 1990) (concluding that the state
28 legislature may share authority with the judiciary to set forth minimum requirements regarding
29 persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate
30 training requirements for those admitted to practice); *Attorney General v. Waldron*, 289 Md.
31 683, 688, 426 A.2d 929,932 (Md. 1981) (striking down as unconstitutional a statute that in the
32 court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional
33 prerequisites to the continued pursuit of their chosen vocation") *See* RESTATEMENT (THIRD) OF
34 THE LAW GOVERNING LAWYERS § 1 cmt. c and Rptr. Note (2000).

35
36 It is important to note that the favorable bar association opinions and the act do not
37 validate every form of collaborative law agreement or collaborative law practice. The act still
38 leaves collaborative lawyers and collaborative law participation agreements subject to regulation
39 by bar ethics committees and other agencies charged with regulating lawyers and to malpractice
40 claims by clients. The act, for example, does not require that lawyers sign the collaborative law
41 participation agreement as parties; rather it requires only that parties identify their collaborative
42 lawyers in participation agreements and that the lawyer acknowledge his or her limited purpose
43 retention. Section 3(a) (6). It leaves questions raised by particular language and form in
44 collaborative law participation agreements to regulation by other sources such as ethics
45 committees. Particular collaborative law participation agreements may have provisions which
46 raise professional responsibility concerns. Scott R. Peppet, *The (New) Ethics of Collaborative*

1 *Law*, 14 DISPUTE. RES. MAG. 23 (Winter 2008). Furthermore, to the extent that a collaborative
2 law participation agreement is also a lawyer-client limited retainer agreement, it must meet
3 whatever requirements are set by state law for lawyer-client retainer agreements. *See* N.Y.
4 COMP. CODES R. & REGS. tit. 22, § 202.16(c) (2007) (governing the lawyer-client relationship in
5 matrimonial matters, including requirement of written retainer agreement).
6

7 While the act does not change professional responsibility obligations of collaborative
8 lawyers, the standards of professional responsibility did influence its drafting in several ways.
9 The emphasis of the ABA Opinion and other ethics opinions on the importance of informed
10 client consent to collaborative law led the drafters of the Uniform Collaborative Law Act to
11 place a special emphasis on this subject, discussed subsequently. *See generally* John Lande &
12 Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of*
13 *Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law* (publication
14 forthcoming). Additionally, the act draws upon the ABA's *Model Rules of Professional Conduct*
15 to define key concepts such as "law firm," "tribunal", "substantially related matter" to insure that
16 parties and collaborative lawyers have ready access to a well known body of law to help
17 determine their obligations under it.
18

19 For fear of raising separation of powers concerns described above, the act also does not
20 prescribe special qualifications and training for collaborative lawyers and other professionals
21 who participate in the collaborative law process. The act's decision against prescribing
22 qualifications and training for collaborative law practitioners should not be interpreted as a
23 disregard for their importance. Qualifications and training are important, but they need not be
24 uniform. Furthermore, the act anticipates that collaborative lawyers and affiliated professionals
25 will form voluntary associations of collaborative professionals who can prescribe standards of
26 practice and training for their members. Many such private associations already exist and their
27 future growth and development after passage of the act is foreseeable and to be encouraged.
28 Finally, the act requires collaborative lawyers who seek to represent victims of domestic violence
29 in collaborative law to be familiar with important American Bar Association standards of
30 practice in the area. (*See infra*).
31

32 **The Requirement of Representation in Collaborative Law**

33

34 Collaborative law requires that parties engage a collaborative lawyer. It is not an option
35 for the self-represented. Requiring parties to be represented differentiates collaborative law from
36 other alternative dispute resolution processes. Generally, self represented litigants are allowed to
37 participate in arbitration. *See* UNIFORM ARBITRATION ACT § 16 (2000) ("A party to an arbitration
38 proceeding *may* be represented by counsel.") (emphasis added).. Several federal and state courts
39 allow self represented litigants in arbitration. *E.g.*, United States District Court for the District of
40 Idaho Home Page, <http://www.id.uscourts.gov/pro-se.htm#Arbitration> (last visited Nov. 12,
41 2008); United States District Court for the Eastern District of Tennessee Home Page,
42 http://www.tned.uscourts.gov/arbitration_handbook.php (last visited Nov. 12, 2008; Delaware
43 Superior Court Home Page,
44 [http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#](http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_compulsory_arbitration.htm#b2)
45 [b2](#) (last visited Nov. 12, 2008). However, some states have taken the opposite view. *E.g.*, US
46 District Court for the Eastern District of New York Home Page,

1 http://www.nyed.uscourts.gov/adr/Arbitration/Arbitration_FAQ/arbitration_faq.html (last visited
2 Nov. 12, 2008).

3
4 Similarly, self represented litigants are generally allowed to participate in mediation. The
5 drafting committee of the Uniform Mediation Act elected to let the parties decide whether to
6 bring counsel into mediation. UNIF. MEDIATION ACT, § 10, comments (2001). State statutes
7 differ on whether a mediator is empowered to exclude lawyers from mediation. Some statutes
8 allow the mediator to do so. *See, e.g.*, CAL. FAM. CODE § 3182 (West 1993); McEwen, et al.,
9 Craig A. McEwen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the*
10 *Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317,
11 1345-1346 (1995). Most statutes are silent on whether the parties' lawyers can be excluded;
12 alternatively, they state that the parties may bring lawyers to the sessions. *See, e.g.*, NEB. REV.
13 STAT. § 42-810 (1997) (domestic relations) (counsel may attend mediation); N.D. CENT. CODE
14 § 14-09.1-05 (1987) (domestic relations) (mediator may not exclude counsel); OKLA. STAT. tit.
15 12, § 1824(5) (1998) (representative authorized to attend); OR. REV. STAT. §107.600(1) (1981)
16 (marriage dissolution) (attorney may not be excluded); WIS. STAT. § 655.58(5) (1990) (health
17 care) (authorizes counsel to attend mediation). However, some courts require party
18 representation to proceed with mediation. *E.g.*, Supreme Court of Indiana Home Page,
19 <http://www.in.gov/judiciary/opinions/archive/120402.rul.html> (last visited Nov. 12, 2008).

20
21 An individual's statutory right to self-representation in court was initially recognized by
22 the Judiciary Act of 1789 and later codified in 28. U.S.C. 1654 (1994) ("In all courts of the
23 United States, parties may plead and conduct their own cases personally").
24 http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf Additionally,
25 the constitution or statutes of many states either expressly or by interpretation provide for the
26 right to self-representation in court. *See*
27 [http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-](http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts)
28 [representation_in_state_courts](http://en.wikipedia.org/wiki/List_of_U.S._State_constitutional_provisions_allowing_self-representation_in_state_courts) (a list of U.S. state constitutional provisions allowing self-
29 representation in state courts)

30
31 Collaborative law is, however, a private, contractual agreement to attempt to resolve
32 disputes out of court. Parties may agree to waive their right to self representation as a condition
33 for participating in it if they do so with informed consent, aware of the risks and benefits of their
34 decision. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative*
35 *Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 954 (2000). Nothing
36 prevents a party from representing him or herself in court if collaborative law terminates.

37
38 The drafting committee also believes that practical considerations require limiting
39 collaborative law to parties who are represented by counsel. If self-represented parties
40 participated in collaborative law, especially if only one side were in this category, there would be
41 a high potential for role confusion, because both parties might look to the single lawyer for an
42 assessment of their rights or relative weakness or strength of their case. Without a neutral party
43 to help balance two sides who may greatly differ in knowledge, power or resources, a self-
44 represented party runs a great risk of impairing his or her case and being manipulated in
45 collaborative law negotiations. Additionally, consent to participate in collaborative law and to
46 agreements resulting there from may not be truly informed without counsel.

1 **Collaborative Law Regulation and Party Autonomy**
2

3 The Uniform Collaborative Law Act is part of a trend that emphasizes client autonomy
4 and “greater reliance on governance of lawyer-client relationship by contract.” Schneyer, *supra*
5 50 ARIZ. L. REV. at 318. The act sets a standard minimum floor for collaborative law
6 participation agreements to inform and protect prospective parties and make collaborative law
7 easier to administer. Parties can add additional provisions to their agreements which are not
8 inconsistent with the core features of collaborative law.
9

10 The act’s philosophy of informed consent and minimal standardized regulation enables
11 parties and their collaborative lawyers to design a collaborative law process through contract that
12 best satisfies their needs and economic circumstances. It is similar to the regulatory philosophy
13 that animates the Uniform Arbitration Act and agreements to arbitrate disputes. (“[A]rbitration is
14 a consensual process in which autonomy of the parties who enter into arbitration agreements
15 should be given primary consideration, so long as their agreements conform to notions of
16 fundamental fairness. This approach provides parties with the opportunity in most instances to
17 shape the arbitration process to their own particular needs”). UNIFORM ARBITRATION ACT
18 Prefatory Note (2000).
19

20 As previously described, collaborative law can be practiced following many different
21 models. There are many varieties of participation agreements – some short, some long, some in
22 legalese and some in plain language. Some models of collaborative law do not require the parties
23 to hire any additional experts to play any role. In other models, collaborative law involves many
24 professionals (e.g., mental health and financial planners) from other disciplines (*See* EAST
25 BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CTS tit. IV, § 3 (2005); in others, it does not (*See*
26 CONTRA COSTA, CA., LOCAL CT. RULE 12.5 (2007)). In some models of collaborative law, mental
27 health professionals play roles such as “divorce coach” or “child specialist”. Christopher M.
28 Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Ethics*, 30
29 CAMPBELL L. REV. 237, 270 (2008). Neutral experts can be engaged by the parties to do a
30 specific task such as an appraisal or valuation or evaluation of parenting issues. *Id*; Pauline H.
31 Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related*
32 *Conflicts*, 2008 J. DISP. RESOL. 83, 92. Some models of collaborative law encourage parties and
33 collaborative lawyers to mediate disputes and call in a third party neutral for that purpose. Tesler,
34 *supra*, at 92.
35

36 In the interests of stimulating diversity and continuing experimentation in collaborative
37 law, the act does not regulate in detail how collaborative law should be practiced. Each model of
38 collaborative law has different benefits and costs, as do different models of mediation or
39 arbitration. A dispute resolution process which involves more professionals will, for example,
40 cost parties more than one which does not. It will also give parties the benefit of access to the
41 expertise of mental health experts and financial planners. There is no particular public policy
42 reason a statute should prefer one model of collaborative practice over another, as opposed to
43 promoting the development of collaborative law generally as a dispute resolution option. It will
44 be up to parties and the marketplace to determine what model of practice best meets party needs.
45

1 Collaborative Law, Subject Matter Limitations and Divorce and Family Disputes

2
3 The act also does not limit the kinds of dispute which parties and lawyers can attempt to
4 resolve through collaborative law. Under it, collaborative law participation agreements could be
5 entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate
6 disputes, employer-employee rights, customer-vendor disagreements or any other matter.
7

8 It is, however, important to acknowledge that collaborative law has seen its greatest
9 growth and development in divorce and family law disputes, as problem-solving approaches to
10 potential settlement are especially appropriate in these sensitive and important matters.
11 Dissolution and reorganization of intimate relationships can generate intense anger, stress and
12 anxiety, emotions which can be exacerbated by adversary litigation. The emotional and
13 economic futures of children and parents, who often have limited resources, are at stake in
14 family and divorce disputes. The needs of children are particularly implicated in divorce cases,
15 as children exposed to high levels of inter-parental conflict “are at [a higher] risk for developing
16 a range of emotional and behavioral problems, both during childhood and later in life” John
17 H. Grych, *Interpersonal Conflict as A Risk Factor for Child Maladjustment: Implications for the*
18 *Development of Prevention Programs*, 43 FAM. CT. REV. 97, 97 (2005); and *see generally*
19 INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH AND APPLICATIONS
20 (John H. Grych & Frank D. Fincham eds., 2001); J. B. Kelly, *Children's Adjustment in*
21 *Conflicted Marriages & Divorce: A Decade Review of Research*, J. OF THE AM. ACAD. OF CHILD
22 & ADOLESCENT PSYCHIATRY, 39, 963-973 (2000). The lower the conflict level between parents,
23 the more the child benefits from contact with the non-custodial parent and the more regularly
24 child support is paid. *See* SCHEPARD, *supra* at 35.
25

26 Divorcing parents may well thus rationally decide that their well being and the well being
27 of their children is better promoted by dispute resolution through collaborative law rather than
28 more traditional courtroom proceedings and adversarial oriented negotiations. “[I]t would be a
29 mistake to focus solely on the risk that [collaborative law] poses for clients. Other things being
30 equal, spouses who choose court-based divorce presumably run the risk the greater risk of
31 harming themselves and their children in bitter litigation or rancorous negotiations.
32 [Collaborative law] clients presumably bind themselves by a mutual commitment to good faith
33 negotiations in hopes of reducing the risk that they will cause such harm, just as Ulysses had his
34 crew time him to the mast so he would not succumb to the Sirens’ call and have his ship
35 founder.” Schneyer, *supra*, 50 ARIZ. L. REV. at 318, n. 142. *See generally*, SCHEPARD, *supra* at
36 50; Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation Research and*
37 *Reflections*, 43 FAM. CT. REV. 22, 34 (2005).
38

39 Indeed, the divorce bar recognizes that divorce and family disputes are particularly
40 appropriate for the problem-solving orientation to client representation that collaborative law
41 encourages. *Bounds of Advocacy*, a supplementary code of standards of professional
42 responsibility for divorce law specialists who are members of the American Academy of
43 Matrimonial Lawyers (AAML), echoes Lincoln and Gandhi in stating that: “[a]s a counselor, the
44 lawyer encourages problem solving in the client The client’s best interests include the well-
45 being of children, family peace and economic stability.” AM. ACAD. OF MATRIMONIAL LAW,
46 BOUNDS OF ADVOCACY (2000) *available at*

1 http://www.aaml.org/files/public/Bounds_of_Advocacy.htm. *Bounds of Advocacy* further
2 states that “the emphasis on zealous representation [used] in criminal cases and some civil cases
3 is not always appropriate in family law matters” and that “[p]ublic opinion [increasingly
4 supports] other models of lawyering and goals of conflict resolution in appropriate cases.” *Id.* at
5 § 2. Furthermore, *Bounds of Advocacy* states that a divorce lawyer should “consider the welfare
6 of, and seek to minimize the adverse impact of the divorce on, the minor children.” *Id.* at § 6.1.
7

8 While collaborative law has, thus far, found its greatest acceptance in divorce and family
9 disputes, the act does not restrict the availability of collaborative law to those subjects. One
10 reason not to limit collaborative law to “divorce and family disputes or matters” is that the act
11 would have to define those terms, a daunting task in light of rapid changes in the field. Should
12 the act, for example, allow collaborative law in disputes arising from civil unions? Premarital
13 agreements? Assisted reproductive technologies? Unmarried but romantically linked business
14 partners? Inheritances? Family trusts and businesses? Child abuse and neglect? Foster care
15 review? Elder abuse? Family related issues cut across many old and emerging categories of
16 fields of law and disputes. Under the act as drafted, the decision whether to use collaborative law
17 to resolve any dispute is left to the parties with the advice of lawyers, not to a statutory subject
18 matter restriction which will be difficult to enforce and controversial to draft.
19

20 More generally, there is no particular policy reason to restrict party autonomy to choose
21 collaborative law to a particular class of dispute. There are reports of use of collaborative law in
22 areas outside of divorce and family practice. See R. Paul Faxon & Michael Zeytoonian,
23 *Prescription For Sanity In Resolving Business Disputes: Civil Collaborative Practice in a*
24 *Business Restructuring Case*, 5 COLLABORATIVE L. J. (Fall 2007). Parties to construction
25 disputes or employment disputes or any kind of matter should be able to elect to participate in
26 collaborative law. Collaborative law is a voluntary dispute resolution option for parties
27 represented by lawyers. A lawyer is required to obtain informed party consent of the benefits and
28 burdens of collaborative law before a party signs a participation agreement. A party’s
29 representation by a lawyer is a check against an improvident agreement. No one is compelled to
30 enter into collaborative law or agree to anything during it. A party can terminate collaborative
31 law at any time and for any reason. Neither the Uniform Arbitration Act nor the Uniform
32 Mediation Act forecloses parties in particular types of disputes from invoking those dispute
33 resolution processes. Hopefully, over time, as collaborative law becomes more established and
34 visible, more parties with disputes in areas other than family and divorce disputes will come to
35 understand its benefits and invoke the benefits and protections of the act.
36

37 **Collaborative Law in Pending Cases**

38
39 The purpose of collaborative law and this act is to encourage parties with the assistance
40 of their counsel to resolve a matter without judicial intervention. That purpose is furthered even
41 if parties choose collaborative law even after a case is commenced in court. Every pending case
42 that is settled without a trial conserves party and public resources for other matters.
43

44 Section 5 of the act thus authorizes parties to a proceeding to sign a collaborative law
45 participation agreement. Notice to the tribunal that an agreement has been signed stays further
46 proceedings, except for status reports. The stay is lifted when collaborative law terminates.

1 Section 6 of the act creates an exception to the stay of proceedings for “emergency orders to
2 protect the health, safety, welfare or interests of a party or family or household member”. In
3 addition, Section 7 authorizes tribunals to approve settlements entered into as a result of
4 collaborative law. These provisions are based on court rules and statutes recognizing
5 collaborative law in a number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN.
6 STAT. §§ 50-70 -79 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA.,
7 LOCAL CT. RULE 12.5 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL.,
8 UNIF. LOCAL RULES OF CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25
9 (2006); EAST BATON ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH,
10 CODE OF JUD. ADMIN. ch. 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative
11 Order No. 07-20-B, *In re Domestic Relations – Collaborative Dispute Resolution in Dissolution*
12 *of Marriage Cases* (June 25, 2007) MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

13 14 **The Scope of the Disqualification Requirement**

15
16 The disqualification requirement for collaborative lawyers is a defining characteristic of
17 collaborative law. Section 8 mandates it be included in all collaborative law participation
18 agreements which seek to benefit from the act. Section 8 also contains additional provisions
19 designed to insure that the disqualification requirement is regarded as a serious commitment to
20 collaborative law by both parties and collaborative lawyers alike and is not easily circumvented.

21 22 *Substantially related matters*

23
24 Section 8 extends the disqualification requirement to matters that are “substantially
25 related” to the “matter” that the parties describe in the collaborative law participation agreement.
26 “Substantially related”, in turn, is defined in Section 2(14) as “involving the same transaction or
27 occurrence, nucleus of operative fact, claim, issue, or dispute as a matter.” The definition draws
28 upon *American Bar Association Model Rules of Professional Conduct* Rule 1.9 which provides
29 that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent
30 another person in the same or a substantially related matter in which that person's interests are
31 materially adverse to the interests of the former” Comment [3] to that Rule states that
32 “[m]atters are “substantially related” for purposes of this Rule if they involve the same
33 transaction or legal dispute....” The additional broadening language in this definition is included
34 to emphasize that in cases of doubt the disqualification provision should be applied more broadly
35 than narrowly.

36
37 There is no definition of what is “substantially related,” and no cases or ethics opinions
38 elaborate on the term for the purposes of defining the scope of the disqualification requirement
39 of collaborative law. The term is discussed in ethics opinions or case law concerning Rule 1.9 of
40 the *American Bar Association Model Rules of Professional Conduct*, (hereinafter “Rule 1.9”),
41 and in case law concerning civil procedure issues. Cases dealing with Rule 1.9 are focused on
42 conflicts of interest and the court therefore takes a narrow approach to what is “substantially
43 related” to maximize a party’s ability to retain counsel of the party’s choice. *See Analytica, Inc.*
44 *v. NPD Research, Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983). Cases concerning civil procedure
45 matters such as joinder of claims or parties and supplemental jurisdiction focus on judicial
46 efficiency and adopt a broad approach to what is “substantially related” as they are more

1 concerned with promoting efficiency in resolution of disputes and conservation of scarce judicial
2 resources. *See, e.g.,* Abraham Natural Foods Corp. v. Mount Vernon Fire Ins. Co., 576 F. Supp.
3 2d 421, 424 (2008) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966)).
4

5 Comment [1] to Rule 1.9 states that “[t]he scope of a ‘matter’ for purposes of this rule
6 depends on the facts of a particular situation or transaction.” Fully developed standards for the
7 application of Section 8’s requirement that collaborative lawyers and lawyers in their law firms
8 be disqualified from “substantially related” matters if collaborative law terminates will require
9 application to specific problems. Key factors that will be useful in making the decision whether a
10 matter is “substantially related” to another matter will, however, include: time elapsed; whether
11 the two arise from the same basic situation and facts; whether confidential information useful in
12 one would be useful in another; whether the matters involve the same or related issues or parties;
13 whether the claims arise from the same transaction or occurrence or series of transactions or
14 occurrences; and whether the wrongs complained of and redress sought, theory of recovery,
15 evidence and material facts alleged are the same in both matters.
16

17 *Imputed disqualification*

18

19 Section 8 also adapts the rule of “imputed disqualification” by extending the
20 disqualification requirement to lawyers in a law firm with which the collaborative lawyer is
21 associated in addition to the lawyer him or herself. Under Section 8, a collaborative lawyer could
22 not, for example, refer the party and the matter to a litigator in a law firm with which the
23 collaborative lawyer is associated if collaborative law terminates. This rule of imputed
24 disqualification is supported by the basic principle of professional responsibility that “[w]hile
25 lawyers are associated in a firm, none of them shall knowingly represent a client when any one
26 of them practicing alone would be prohibited from doing so” MODEL RULES OF PROF’L
27 CONDUCT R. 1.10(a) (2002). The comment to this Rule states: “[t]he rule of imputed
28 disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it
29 applies to lawyers who practice in a law firm. Such situations can be considered from the
30 premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing
31 loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation
32 of loyalty owed by each lawyer with whom the lawyer is associated.” MODEL RULES OF PROF’L
33 CONDUCT R. cmt. 1.10[2] (2002).
34

35 **Collaborative Law and Low-Income Parties**

36

37 Section 9 modifies the imputed disqualification rule for lawyers in law firms with which
38 the collaborative lawyer is associated if the collaborative lawyer represents a very low- income
39 client without fee. The goal of this section is to allow the legal aid office, law firm or law school
40 clinic with which the lawyer is associated to continue to represent the party in the matter if
41 collaborative law terminates. The conditions for such continued representation are that all parties
42 to the collaborative law participation agreement consent to it in advance and that the
43 collaborative lawyer be screened from further participation in the matter.
44

45 The exception to the imputed disqualification rule in section 9 is based on the recognition
46 that 80% of low-income Americans who need civil legal assistance do not receive it and legal aid

1 programs reject approximately one million cases per year for lack of resources to handle them, a
2 figure which does not include those who did not attempt to get legal help for whatever reason..
3 Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASHINGTON POST, Oct. 15,
4 2005 at A09. The Legal Services Corporation recently did a study about the lack of civil legal
5 services for low-income Americans. Their results show that only one-fifth or less of the legal
6 problems experienced by low-income people are helped by either pro bono or paid legal aid
7 attorneys and only half of those who seek help will actually get legal help. Roughly one million
8 people a year are turned away because of lack of resources, In 2002, there was one private
9 attorney to every 525 people from the general population. In that same year, there was only one
10 legal aid attorney to every 6,861 people in poverty. LEGAL SERVICE CORPORATION,
11 DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF
12 LOW-INCOME AMERICANS. (2d ed.2007).

13
14 The need for civil legal representation for low-income people is particularly acute in
15 family law disputes. Recent studies have found that 70% of family law litigants do not have a
16 lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage
17 increases to 80% by the time the matter is final. California Judicial Council, *Task Force on Self*
18 *Represented Litigants available at*
19 http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf . 49% of petitioners and
20 81% of respondents were self represented in Utah divorce cases in 2006. Committee on
21 Resources for Self Represented Parties, *Strategic Planning Initiative, Report to the Utah Judicial*
22 *Council (July 25, 2006) available at*
23 [http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Pl](http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf)
24 [an%202006.pdf](http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf).

25
26 Low-income clients thus already face great difficulty in securing representation. They
27 would face especially harsh consequences if collaborative law terminates without agreement and
28 virtually all lawyers who might continue their representation are disqualified from doing so. For
29 most other parties, the disqualification requirement imposes a hardship if collaborative law
30 terminates, but they at least have the financial resources to engage new counsel. Low-income
31 clients, however, are unlikely to obtain a new lawyer from any other source. The *ABA Model*
32 *Rules of Professional Conduct* make a similar accommodation to the needs of low-income
33 parties by exempting non-profit and court-annexed limited legal services programs from the
34 imputed disqualification rule applicable to for profit firms. MODEL RULES OF PROF'L CONDUCT
35 6.5 (2002).

36
37 The relaxation of the imputed disqualification rule for low income clients of section 9
38 will, hopefully, encourage legal aid offices, law school clinical programs and private law firms
39 who represent the poor through *pro bono* programs to incorporate collaborative law into their
40 practice. It should also encourage other jurisdictions to experiment with court based
41 collaborative law centers similar to the one sponsored by Chief Judge Kaye of New York.

42 43 **Collaborative Law and Government Parties**

44
45 Section 10 of the act creates a similar exception to the imputed disqualification rule for
46 lawyers in law firms with which a collaborative lawyer is associated who represent government

1 parties. Section 10 is based on the policy that taxpayers should not run the risk of the government
2 having to pay for private outside counsel if collaborative law terminates because all the lawyers
3 representing the government are disqualified from further representation. The conditions for the
4 continued representation are advance consent of all parties to the continued representation and
5 the screening of the individual collaborative lawyer from further participation in it.
6

7 The policy behind Section 10 is supported by Rule 1.11 of the *ABA Model Rules of*
8 *Professional Conduct* which creates an exception to general rule of imputed disqualification for
9 government lawyers “because of the special problems raised by imputation within a government
10 agency ... although ordinarily it will be prudent to screen such lawyers” from further
11 participation in the matter from which the lawyer is disqualified. MODEL RULES OF PROF’L
12 CONDUCT 1.11 cmt. [2] (2002). Courts also are willing to recognize screening of individual
13 attorneys as a desirable alternative to a wholesale disqualification of an entire agency. *See*
14 *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990) (not allowing the disqualification of the
15 United States Attorney’s Office when a screen was in place for the head of the office who was
16 previously the defendant’s attorney); *see also* *United States v. Caggiano*, 660 F.2d 184 (6th Cir.
17 1981) (denying disqualification of federal prosecutor’s office even though a new assistant
18 prosecutor had previously represented the accused, when individual attorney was not assigned to
19 present matter).
20

21 **Voluntary Disclosure of Information in Collaborative Law**

22

23 Voluntary disclosure of information is a hallmark of collaborative law. A collaborative
24 law participation agreement typically requires timely, full, candid and informal disclosure of
25 information substantially related to the matter at issue. Elizabeth Strickland, *Putting*
26 *“Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt*
27 *Collaborative Law Statutes*, 84 N. C. L. REV. 979, 984 (2006). Agreement to voluntary disclosure
28 helps to build trust between the parties, something crucial to a successful end result. PAULINE
29 TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT*
30 *LITIGATION* 98 (2001). It is also less expensive than formal discovery. Douglas C. Reynolds &
31 Doris F. Tenant, *Collaborative Law—An Emerging Practice*, 45 BOSTON B. J. 5, Nov./Dec.
32 2001, at 1.
33

34 Disclosure of information in collaborative law is made without formal discovery devices
35 when the other party requests it, and there is an ongoing obligation to provide notice of material
36 changes. Should the parties choose to be more formal in their discovery, they are entitled to do
37 so. They have considerable flexibility in determining how to exchange information.
38

39 Section 11 codifies this feature of collaborative law by requiring that parties to a
40 collaborative law participation agreement “shall make timely, full, candid, and informal
41 disclosure of information substantially related to the matter upon request of a party, but without
42 formal discovery, and shall promptly update information which has materially changed.” Similar
43 requirements have been established for parties in mediation. *See* GA. SUP. CT. A.D.R. R. app. C
44 (7) (2008) (referring to the expectation of parties who participate in mediation “to negotiate in an
45 atmosphere of good faith and full disclosure of matters material to any agreement reached”).
46

1 The obligation of voluntary disclosure imposed by Section 11 on parties to collaborative
2 law is part of a trend to encourage voluntary disclosure without formal discovery requests early
3 in a matter in the hope of encouraging careful assessment and settlement. Most disputed matters
4 that reach the formal litigation system settle before trial and before completion of all formal
5 discovery Parties to collaborative law are thus no different than parties in litigation in having to
6 make cost- benefit assessments with the aid of their counsel about whether they have enough
7 information from the informal process of disclosure to settle at any particular time or need or
8 want more.
9

10 Federal Rule of Civil Procedure 26(a) requires that a party to litigation disclose names of
11 witnesses, documents, and computation of damages “without awaiting a discovery request.” This
12 early automatic disclosures was based on a consensus that the adversarial discovery process for
13 obtaining information had proven to be unduly time consuming and expensive. See generally
14 Fed. R. Civ. P. 26(a) advisory committee’s note (1993). Many states mandate compulsory
15 financial disclosure in divorce cases even without a specific request from the other party. See
16 N.Y. DOM. REL. § 236(4) (2008) (mandating compulsory disclosure of specific financial
17 information without a request from the other party); ALASKA R. CIV. P. 26.1 (listing information
18 that must be disclosed to the other party in a divorce proceeding even in the absence of a
19 request).
20

21 Section 11 also relies on the honor of parties to collaborative law and their counsel to
22 voluntarily provide information. In this respect too, collaborative law is consistent with emerging
23 legal trends. Formal discovery is already generally thought of as a self-regulating process
24 conducted out of court by the parties and their counsel, with court intervention as the option of
25 last resort. *Unklesbay v. Fenwick*, 167 Ohio App. 3d. 408 (Ohio Ct. App. 2006). Fed. R. Civ. P.
26 26(f) now contemplates a consensual approach to discovery including discovery plans (i.e., a
27 listing of the information sought and discovery procedures to be utilized). Herb Ross, *Alternative*
28 *Dispute Resolution: Mediation in the Federal Courts Began in the 70’s*, 31 ALASKA B. RAG 30,
29 30-31 (Jan.-Mar. 2007). Parties are already expected to voluntarily reveal facts and documents
30 that may be prejudicial or harmful if requested through formal discovery. Tesler, *supra* at 423.
31

32 The *Federal Rules of Civil Procedure* also require parties to supplement or correct a
33 discovery response without request of the other side if “the party learns that in some material
34 respect the disclosure or response is incomplete or incorrect, and if the additional or corrective
35 information has not otherwise been made known to the other parties during the discovery process
36 or in writing...” Fed. R. Civ. P. 26(e)(1), See *Argusea LDC v. United States*, No. 06-22722-CIV
37 COOKE/BROWN, 2008 U.S. Dist. LEXIS 20084 (S.D.F.L. 2008) (party is not bound by
38 original answer to interrogatories if properly supplemented under 26(e)(1)(A)), *Inline*
39 *Connection Corp. v AOL*, 472 F. Supp. 2d. 604 (D. Del. 2007) (Evidence not properly amended
40 under Fed. R. Civ. P. 26(e) may be inadmissible in court). Many states impose similar
41 obligations on parties. R.I. SUP. CT. R. CIV. P. Form 9 (2007).
42

43 Voluntary disclosure of information pursuant to section 11 is facilitated by the
44 evidentiary privilege for collaborative law communications under sections 14-16 with the
45 provisio that “[e]vidence or information that is otherwise admissible or subject to discovery does
46 not become inadmissible or protected from discovery solely by reason of its disclosure or use in

1 a collaborative law process” Section 14 (c).

2
3 The informal disclosure of information in collaborative law is also facilitated by the
4 ability of a party to unilaterally terminate collaborative law at any time and for any reason,
5 including failure of another party to produce requested information. Section 4(b). Thus, if the
6 parties wish to abandon collaborative law in favor of litigation, they are free to do so and to
7 engage in any court sanctioned discovery that might apply to their circumstances.

8 9 **Collaborative Law and Informed Consent**

10
11 Parties should enter into collaborative law with informed consent, and, under the act a
12 potential collaborative lawyer has a duty to actively facilitate it. The legitimacy of collaborative
13 law and other ADR processes “depends in large measure upon consensual decision
14 making...Consent promotes fairness and enhances human dignity and it is linked to durability
15 and sustainability in negotiated agreements.” Jacqueline Nolan-Haley, *Consent in Mediation*, 14
16 DISPUTE RES. MAG. 4 (2008). “[F]avoring more client autonomy [in contractual arrangements
17 with lawyers] places great stress on the need for full lawyer disclosure and informed client
18 consent before entering into agreements that pose significant risks for clients.” Schneyer, *supra*,
19 50 ARIZ. L. REV. at 320.

20
21 The *Model Rules of Professional Conduct* define informed consent as “the agreement by
22 a person to a proposed course of conduct after the lawyer has communicated adequate
23 information and explanation about the material risks of and reasonably available alternatives to
24 the proposed course of conduct.” MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2002). *See*
25 *Conklin v. Hanochowisman*, 145 N.J. 395, 413, 678 A2d 1060, 1069 (1996) (“An attorney in a
26 counseling situation must advise a client of the risks of a transaction in terms sufficiently clear to
27 enable the client to assess the client’s risks. The care must be commensurate with the risks of the
28 undertaking and tailored to the needs and sophistication of the client”).

29
30 Potential parties considering collaborative law will have different needs and levels of
31 sophistication to which a lawyer must adopt measures to secure informed consent. In the medical
32 area, for example, the:

33
34 “doctrine [of informed consent] imposes two independent duties on the medical
35 provider: first, the medical practitioner has a duty to disclose information; and second,
36 the practitioner has an obligation to obtain an informed consent from the patient. In
37 order to grant an informed consent, the patient (1) must be competent, (2) must
38 understand the information conveyed, and (3) must voluntarily give his consent free
39 from coercion. The informed consent doctrine envisages a joint decision-making
40 process in which the physician digests the technical information for the patient and
41 transmits this information in a manner comprehensible by a layperson. The patient, in
42 turn, asks questions, evaluates the information conveyed, and agrees to either proceed
43 or not to proceed with the recommended treatment.” Paula Walter, *The Doctrine of*
44 *Informed Consent: To Inform or Not to Inform?* 71 ST. JOHN’S L. REV 543, 547-48
45 (1997).

1 Consistent with its overall regulatory philosophy, the act sets a minimum floor to
2 facilitate informed consent to collaborative law but does not prescribe any particular method or
3 form for a lawyer to use to do so, leaving that subject to professional judgment and training. The
4 act requires that a lawyer describe the benefits of collaborative law to a potential party, along
5 with its essential risk – that termination of the process, which any party has the right to do at any
6 time, will cause the disqualification provision to take effect, imposing the economic and
7 emotional costs on all parties of engaging new counsel. It also adopts the previously mentioned
8 requirement of many states that lawyers identify and discuss the costs and benefits of other
9 reasonable dispute resolution options with a potential party to collaborative law which could
10 include litigation, cooperative law, mediation, expert evaluation, or arbitration or some
11 combination of these processes. John Lande & Gregg Herman, *Fitting the Forum to the Family*
12 *Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce*
13 *Cases*, 42 FAM. CT. REV. 280 (2004). The act also asks that the lawyer do more than lecture a
14 prospective party or provide written information about these subjects, requiring that the lawyer
15 “*inquire about and discuss with the potential party factors relevant to whether the collaborative*
16 *law process is appropriate for the potential party’s matter.*” Section 12(a)(3) (emphasis added).
17

18 The act’s requirements should not be viewed as the ceiling for lawyer-potential party
19 discussion of the risks and benefits of collaborative law. “Lawyers should provide thorough and
20 balanced descriptions of [collaborative law] practice, including candid discussion of possible
21 risks.... Lawyers may understandably worry about losing possible [collaborative law] cases if
22 they provide more thorough and balanced information, but any parties who are discouraged by
23 more complete information would presumably not be appropriate for [collaborative law].” Lande
24 & Mosten, *supra*, 62-63. Hopefully, lawyers who truly seek informed consent will take steps to
25 continuously make the information they provide to prospective parties ever easier to understand
26 and more complete. See Forrest S. Mosten, *Collaborative Law Practice: An Unbundled*
27 *Approach to Informed Client Decision Making* 2008 J. DISP. RESOL. 163.
28

29 Collaborative Law and Domestic Violence

30
31 While the act does not limit the reach of collaborative law to divorce and family disputes,
32 it does address the problem of domestic violence. Domestic violence, however, is not limited to
33 divorce and family disputes but can arise in many different contexts such as dissolution of a
34 business between formerly intimate partners. The act itself attempts no definition of domestic
35 violence, as that term is defined differently in different states. For example, Delaware, Maine,
36 and New Mexico define domestic violence to include not only physical acts of violence, but also
37 acts that cause emotional distress such as stalking and harassment, as well as destruction of
38 property, trespassing, and forcing a person to engage in certain conduct through threats and
39 intimidation. DEL. CODE ANN. tit. 10, § 1041 (2009), ME. REV. STAT. ANN. tit. 19-A, § 4002
40 (2008), N.M. STAT. ANN. § 40-13-2 (West 2008). Colorado and Idaho, in contrast, limit domestic
41 violence to physical assault. COLO. REV. STAT. ANN. § 13-14-101 (West 2008), IDAHO CODE
42 ANN. § 39-6303 (2008).
43

44 A useful working definition of domestic violence for purposes of this Preface, however,
45 is: “[p]hysical abuse, alone or in combination with sexual, economic or emotional abuse, stalking
46 or other forms of coercive control, by an intimate partner or household member, often for the

1 purpose of establishing and maintaining power and control over the victim.” AMERICAN BAR
2 ASSOCIATION, COMMISSION ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS
3 REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL
4 PROTECTION ORDER CASES Standard II A (2007).

5
6 There is no doubt that domestic violence exists in a significant number of matters that
7 find their way to the legal system and poses a serious, potentially lethal, threat to the safety of a
8 significant number of victims and dependents. Advocates have, over many years, made great
9 progress in helping make the legal system more responsive to the needs of victims of domestic
10 violence. Nonetheless, there is much we do not know about domestic violence and many
11 challenges remain. Because of definitional differences and research difficulties we do not know,
12 for example, exactly what percentage of disputes which find their way to lawyers and courts
13 involve domestic violence. Furthermore, despite public education campaigns, victims still are
14 often reluctant to disclose the abuse they suffer. *See Nancy Ver Steegh & Clare Dalton Report*
15 *from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV.
16 454 (2008) (report of working group of experienced practitioners and researchers convened by
17 the National Council of Juvenile and Family Court Judges and the Association of Family and
18 Conciliation Courts summarizing the state of research about domestic violence and discussing
19 challenges in making family court interventions more effective with families in which domestic
20 violence has been identified or alleged).

21
22 Reconciling the need to insure safety for victims of domestic violence with the party
23 autonomy that alternative dispute resolution processes such as collaborative law assumes is a
24 significant and continuing challenge for policy makers and practitioners. *See Peter Salem &*
25 *Billie Lee Dunford Jackson, Beyond Politics and Positions: A Call for Collaboration Between*
26 *Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008) (Executive
27 Director of the Association of Family and Conciliation Courts and Co-Director of the Family
28 Violence Department of the National Council of Juvenile and Family Court Judges examine
29 practical, political, definitional and ideological differences between family court professionals
30 who emphasize alternative dispute resolution and domestic violence advocates and call for
31 collaboration on behalf of families and children). A full discussion of this complex and vital
32 topic cannot be undertaken in the space available here. It perhaps suffices to note that serious
33 questions are raised about whether a victim can give informed consent to entry into collaborative
34 law or to agreements which result from it when a batterer inflicts a pattern of control and
35 intimidation on her. On the other hand, sporadic incidents not part of an overall pattern of
36 intimidation and control do occur in divorce and family disputes, sometimes allegations of
37 violence are exaggerated, and in some circumstances, victims want and may be able to
38 participate in a process of alternative dispute resolution like collaborative law. *See Nancy Ver*
39 *Steegh, Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the*
40 *Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

41
42 The act addresses domestic violence concerns in several sections and imposes a
43 responsibility on collaborative lawyers to address these competing concerns. Section 6 creates an
44 exception to the stay of proceedings created by filing a notice of collaborative law with a tribunal
45 for “emergency orders to protect the health, safety, welfare or interests of a party or family or
46 household member.” Section 8(c)(2) also creates an exception to the disqualification requirement

1 for a collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is
2 associated to represent a victim in seeking such emergency orders. These sections insures that a
3 victim of domestic violence who participates in collaborative law will continue to have the
4 assistance of counsel and access to the court in the face of an immediate threat to her safety or
5 that of her dependent. They are consistent with the *Model Rules of Professional Conduct*
6 provisions that “a lawyer may withdraw from representing a client if ... withdrawal can be
7 accomplished without material adverse effect on the interests of the client” and: “upon
8 termination of representation, a lawyer shall take steps to the extent reasonably practicable to
9 protect a client's interests...” MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(1) & (d) (2002).

10
11 Section 12(b) requires a collaborative lawyer to screen a potential party to collaborative
12 law for a history of domestic violence. Screening protocols already exist which lawyers can use
13 to satisfy the obligation imposed by the act. See AMERICAN BAR ASSOCIATION COMMISSION ON
14 DOMESTIC VIOLENCE, TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE (2007).
15 Section 12(c) requires that the lawyer not commence or continue collaborative law if a potential
16 party or party is a victim of domestic violence unless the victim consents and the lawyer
17 reasonably believes that the victim’s safety can be protected while the process goes on. Many
18 state statutes allow victims of domestic violence to opt out of mediation. See, e.g., FLA. STAT. §
19 44.102(2)(c) (2005); UTAH CODE ANN. § 30-3-22(1) (Supp. 1994). See generally American Bar
20 Association Comm’n on Domestic Violence, *Mediation in Family Law Matters Where DV is*
21 *Present* (Jan. 2008) (comprehensive listing of state legislation and rules on subject as of the date
22 of the compilation, which includes the notation “[t]law is constantly changing...”). Section
23 12(c)(3) extends a similar option to collaborative law by requiring the victim’s consent to begin
24 or continue the process.

25
26 Some have argued a lawyer commits malpractice when he or she fails to recognize when
27 a client is or has been abused by a partner and fails to consider that factor in providing legal
28 representation to the client. Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are*
29 *We Revictimizing Our Clients*, 39 FAM. L.Q. 7 (2005). These obligations placed on collaborative
30 lawyers by the act to incorporate screening and sensitivity to domestic violence in their
31 representation of parties parallel obligations placed on mediators. MODEL FAM. & DIVORCE
32 MEDIATION STANDARDS X (2001) (“A family mediator shall recognize a family situation
33 involving domestic abuse and take appropriate steps to shape the mediation process
34 accordingly”); *Id.* X D 6. (“If domestic abuse appears to be present the mediator shall consider
35 taking measures to insure the safety of participants ... including ... suspending or terminating the
36 mediation sessions, with appropriate steps to protect the safety of the participants”).

37
38 The act does not, however, prescribe special qualifications and training in domestic
39 violence for collaborative lawyers and other professionals who participate in the collaborative
40 law process for fear of inflexibly regulating a still-developing dispute resolution process. The act
41 also takes this position to minimize the previously mentioned risk of raising separation of powers
42 concerns in some states between the judicial branch and the legislature in prescribing the
43 conditions under which attorneys may practice law (See *supra*).

44
45 The act, however, recognizes that representing victims of family violence is a complex
46 task requiring specialized knowledge, especially when the representation occurs in dispute

1 resolution processes like collaborative law which rely heavily on self-determination by parties.
2 Thus, 12 (c) (3) requires collaborative lawyers who represent a party with a history of domestic
3 violence to be familiar with relevant and important Standards of Practice created by the
4 American Bar Association- THE STANDARDS OF PRACTICE FOR REPRESENTING VICTIMS OF
5 DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES;
6 STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT
7 CASES; AND STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT PARENTS IN ABUSE AND
8 NEGLECT CASES. Attorneys can be required to be familiar with standards of practice in an area in
9 order to ensure competency of legal representation. Two provisions of the Texas Family Code
10 require familiarity with ABA standards of practice for attorneys who represent children in
11 custody cases. TEX. FAM. CODE § 107.004 (2007) (also requiring familiarity with ABA’s
12 standards of practice for attorneys who represent children in abuse and neglect cases, the
13 suggested amendments to those standards adopted by the National Association of Counsel for
14 Children, and at least three hours of continuing legal education relating to child advocacy); TEX.
15 FAM. CODE § 107.005 (2007). In addition, courts often require familiarity with state codes of
16 professional conduct. *See, e.g.*, E.D. CAL. R. 83-180(e); C.D. CAL. R. 83-3.1.2; S.D. Cal. R.
17 83.4; FLA. R. 20TH CIR. ADM. ORDER 2.20; IOWA R. 31.14(10); D.N.H. R. DR-1; Bankr. D.N.H.
18 R. 2090-2(c)(1); D. MASS. R. 83.5.1(6); D. HAW. R. 83.7(c)(1); N.Y. CT. APP. R. 520.11(d)(1).
19 Courts also require familiarity with certain American Bar Association (hereinafter, “ABA”)
20 guidelines. *See, e.g.*, ARIZ. R. CRIM. P. 6.8 (ABA Guidelines for the Appointment and
21 Performance of Defense Counsel in Death Penalty Cases); MONT. CT. R. 9 (ABA Standards for
22 the Defense of Capital Cases); WYO. U.R.D.C. Rule 106(2)(B) (ABA Standards of Practice for
23 Lawyers Who Represent Children in Abuse and Neglect Cases (1996)). Familiarity with court-
24 adopted guidelines or state statutes may also be required. *See, e.g.*, CAL. SUPER. CT. R.
25 17.16(f)(1) (California Welfare and Institutions Code § 317(e) and court rules regarding
26 standards of representation in juvenile dependency and delinquency proceedings); D. WYO. R.
27 83.6 (medical and legal relationships).

28
29 Finally, the act, like the Uniform Mediation Act, creates an exception to the evidentiary
30 privilege otherwise extended to a collaborative law communication which is: “a threat or
31 statement of a plan to inflict bodily injury or commit a crime of violence”, section 16 (a)(3); or is
32 “intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing
33 crime or ongoing criminal activity” section 16(a)(4); or is “sought or offered to prove or disprove
34 abuse, neglect, abandonment, or exploitation of a child” Section 16(a)(6). These exceptions
35 recognize that the need for confidentiality in collaborative law communications must yield to the
36 value of protecting the safety of victims.

37 38 **Collaborative Law Communications and Evidentiary Privilege**

39
40 A major contribution of the Uniform Collaborative Law Act is to create a privilege for
41 collaborative law communications in legal proceedings, where it would otherwise either not be
42 available or not be available in a uniform way across the states. The Uniform Collaborative Law
43 Act thus creates an evidentiary privilege for communications made in the collaborative law
44 process similar to the privilege provided to communications during mediation by the Uniform
45 Mediation Act.

1 Protection for confidentiality of communications is central to collaborative law. Parties
2 may enter collaborative law with fear that what they say during collaborative law sessions may
3 be used against them in later judicial proceedings. Without assurances that communications
4 made during the collaborative law process will not be used to their detriment later, parties,
5 collaborative lawyers and non party participants such as mental health and financial
6 professionals will be reluctant to speak frankly, test out ideas and proposals, or freely exchange
7 information. Undermining the confidentiality of the process would impair full use of
8 collaborative law. John Lande, *Using Dispute System Design Methods to Promote Good faith*
9 *Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69, 102 (2002).

10
11 Confidentiality of communications can also refer to broader concepts than admission of
12 the information into the formal record of a proceeding. It is possible for collaborative law
13 communications to be disclosed outside of legal proceedings, for example, to family members,
14 friends, business associates, the press and the general public. Like the Uniform Mediation Act,
15 however, the Uniform Collaborative Law Act limits statutory protections for confidentiality to
16 legal proceedings. It does not prohibit disclosure of collaborative law communications to third
17 parties outside of legal proceedings. That issue is left to the agreement of the parties as
18 expressed in their collaborative law participation agreements, other bodies of law and to the
19 ethical standards of the professions involved in collaborative law. *See* Section 12. *See generally*
20 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (stating that an attorney is required to keep in
21 confidence "information relating to the representation of a client unless the client gives informed
22 consent, the disclosure is impliedly authorized in order to carry out the representation ..." or
23 under a few exceptions, including, among others, when it is necessary to prevent reasonably
24 certain death or substantial bodily harm or to comply with a court order or law).

25
26 The drafters believe that a statute is required only to assure that aspect of confidentiality
27 relating to evidence compelled in judicial and other legal proceedings. Parties uniformly expect
28 that aspect of confidentiality to be enforced by the courts, and a statute is required to ensure that
29 it is. Parties' expectations of additional confidentiality need clarification by mutual agreement.
30 Do they want, for example, to be able to reveal collaborative law communications regarding a
31 potential divorce settlement agreement concerning children to friends and family members for
32 the purposes of seeking advice and emotional comfort? Parties can answer questions like that
33 "yes" or "no" or "sometimes" in their agreements depending on their particular needs and
34 orientation.

35
36 Parties can expect enforcement of their agreement to keep communications more broadly
37 confidential through contract damages and, sometimes, specific enforcement. The courts have
38 also enforced court orders or rules regarding nondisclosure through orders to strike pleadings and
39 fine lawyers. *See* UNIF. MEDIATION ACT § 8 (amended 2003); *see also* Parazino v. Barnett Bank
40 of South Florida, 690 So.2d 725 (Fla. Dist. Ct. App. 1997); Bernard v. Galen Group, Inc., 901 F.
41 Supp. 778 (S.D.N.Y. 1995).

42
43 Promises, contracts, and court rules or orders are unavailing, however, with respect to
44 discovery, trial, and otherwise compelled or subpoenaed evidence. While the earliest recognized
45 privileges were judicially created, this practice stopped over a century ago. *See* MCCORMICK'S
46 ON EVIDENCE § 75 (6th Ed. 2006). Today, evidentiary privileges are rooted within legislative

1 action; some state legislatures have even passed statutes which bar court-created privileges. *See,*
2 *e.g.* CAL. EVID. CODE § 911 (2008); WIS. STAT. §905.01 (2007).

3
4 The settlement negotiations privilege does not provide the same level of protection for
5 collaborative law communications as does the privilege created by the act. Under the *Federal*
6 *Rules of Evidence*, and similar state rules of evidence, while a settlement offer and its
7 accompanying negotiations may not be admitted into evidence in order to prove liability or
8 invalidity of a claim or its amount, it may be admissible for a variety of other purposes. FED. R.
9 EVID. 408; *Lo Bosco v. Kure Engineering Ltd.*, 891 F. Supp. 1035 (D.N.J. 1995) (plaintiff's
10 offer of reconciliation to spouse in letters related to a divorce proceeding is not admissible as an
11 admission of liability in subsequent lawsuit against spouse based on failed business relationships,
12 but is admissible for other purposes such as proving plaintiff's bias or prejudice, or negating a
13 contention of undue delay); *F.D.I.C. v. Moore*, 898 P.2d 1329 (Okla. Ct. App. Div. 1 1995) (trial
14 court erred in holding the debtors' letter offers of settlement inadmissible because they were
15 admissible on the issue of commencement of a new statute of limitations period). *See also* 32
16 C.J.S. EVIDENCE § 380 (2007) (citing relevant examples of case law in thirteen states).

17
18 By contrast, the Uniform Collaborative Law Act provides for a broader prohibition on
19 disclosure of communications within the collaborative law process. For example, the evidentiary
20 privilege in the act applies to an array of communications, not limited to those produced in a
21 formal four-way session such as communications before the session begins and in preparation for
22 the session. In addition, the privilege allows parties to block not only their own testimony from
23 future disclosure, but also communications by any other participant in the collaborative law
24 process such as jointly retained experts. To encourage non parties such as mental health
25 professionals and financial experts to participate in collaborative law, the act gives them a
26 privilege to block their own communications from being introduced into evidence.

27
28 As with the privilege for mediation communications, the privilege for collaborative law
29 communications has limits and exceptions, primarily to give appropriate weight to other valid
30 justice system values, such as the protections of bodily integrity and to prosecute and protect
31 against serious crime. They often apply to situations that arise only rarely, but might produce
32 grave injustice in that unusual case if not excepted from the privilege.

33 34 **The Need for a Uniform Collaborative Law Act**

35
36 It is foreseeable that collaborative law participation agreements and sessions will cross
37 jurisdictional boundaries as parties relocate, and as the collaborative law process is carried on
38 through conference calls between collaborative lawyers and parties in different states and even
39 over the Internet. Because it is unclear which state's laws apply, the parties cannot be assured of
40 the reach of their home state's provisions on the enforceability of collaborative law participation
41 agreements and confidentiality protections.

42
43 A Uniform Collaborative Law Act will help bring order and understanding of the
44 collaborative law process across state lines, and encourage the growth and development of
45 collaborative law in a number of ways. It will ensure that collaborative law participation
46 agreements that meet its minimum requirements entered into in one state are enforceable in

1 another state if one of the parties moves or relocates. Enactment of the Uniform Collaborative
2 Law Act will also ensure more predictable results if a communication made in collaborative law
3 in one state is sought in litigation or other legal processes in another state. Parties to the
4 collaborative law process cannot always know where the later litigation may occur. Without
5 uniformity, there can be no firm assurance in any state that a privilege for communications
6 during the collaborative law process will be recognized. Uniformity will add certainty on these
7 issues, and thus will encourage better-informed party self-determination about whether to
8 participate in collaborative law.
9

1 **UNIFORM COLLABORATIVE LAW ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Collaborative
3 Law Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Collaborative law” or a “collaborative law process” means a procedure to attempt to
6 resolve a matter without intervention by a tribunal in which parties:

- 7 (A) voluntarily enter into a collaborative law participation agreement; and
- 8 (B) are represented by collaborative lawyers.

9 (2) “Collaborative law communication” means a statement, whether oral or in a record or
10 verbal or nonverbal, that:

- 11 (A) occurs after the parties enter into a collaborative law participation agreement
12 and before the parties have or should have a reasonable belief that a collaborative law process is
13 terminated or is concluded by negotiated resolution of a matter; and

- 14 (B) is made for the purpose of conducting, participating in, continuing, or
15 reconvening a collaborative law process.

16 (3) “Collaborative law participation agreement” means an agreement by persons to
17 participate in collaborative law.

18 (4) “Collaborative lawyer” means a lawyer who represents a party in collaborative law.

19 (5) “Law firm” means lawyers who practice together in a partnership, professional
20 corporation, sole proprietorship, limited liability corporation, or other association authorized to
21 practice law, or lawyers employed in a legal services organization or the legal department of a
22 corporation or other organization or the legal department of a government or governmental
23 subdivision, agency, or instrumentality,

1 (6) “Matter” means a dispute, transaction, claim, problem, or issue for resolution
2 described in a collaborative law participation agreement. The term includes a dispute, claim, or
3 issue in a proceeding.

4 (7) “Nonparty participant” means a person, other than a party and the party’s
5 collaborative lawyer, that participates in a collaborative law process.

6 (8) “Party” means a person that enters into a collaborative law participation agreement
7 and whose consent is necessary to resolve a matter.

8 (9) “Person” means an individual, corporation, business trust, estate, trust, partnership,
9 limited liability company, association, joint venture, public corporation, government or
10 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

11 (10) “Proceeding” means a judicial, administrative, arbitral, legislative, or other
12 adjudicative process before a tribunal, including related pre hearing and post hearing motions,
13 conferences, and discovery.

14 (11) “Prospective party” means a person that discusses the possibility of entering into a
15 collaborative law participation agreement with a potential collaborative lawyer.

16 (12) “Record” means information that is inscribed on a tangible medium or that is stored
17 in an electronic or other medium and is retrievable in perceivable form.

18 (13) “Sign” means, with present intent to authenticate or adopt a record:

19 (A) to execute or adopt a tangible symbol; or

20 (B) to attach to or logically associate with the record an electronic symbol, sound,
21 or process.

22 (14) “Substantially related” means involving the same transaction or occurrence, nucleus
23 of operative fact, claim, issue, or dispute as a matter.

1 (15) “Tribunal” means a court, arbitrator, legislative body, administrative agency, or
2 other body acting in an adjudicative capacity that, after presentation of evidence or legal
3 argument, has jurisdiction to render a decision affecting a party’s interests in a matter.

4 **Comment**

5 **“Collaborative law,” “collaborative law process” and “collaborative law**
6 **participation agreement.”** Collaborative law is created by written contract, a collaborative law
7 participation agreement. It requires parties to engage collaborative lawyers. The minimum
8 requirements for collaborative law participation agreements are specified in section 3.
9

10 **“Collaborative law communication.”** Section 14 creates an evidentiary privilege for
11 collaborative law communications, a term defined here. The definition of “collaborative law
12 communication” parallels the definition of “mediation communication” in the *Uniform*
13 *Mediation Act* § 2(2). Collaborative law communications are statements that are made orally,
14 through conduct, or in writing or other recorded activity. This definition is similar to the general
15 rule, as reflected in *Federal Rule of Evidence* 801(a), which defines a “statement” as “an oral or
16 written assertion or nonverbal conduct of an individual, if it is intended by the person as an
17 assertion.” FED. R. EVID. 801(a).
18

19 The definition of “collaborative law communication” has a fixed time element- it only
20 includes communications that occur between the time a collaborative law participation
21 agreement is signed and before collaborative law is terminated or agreement is reached. The
22 methods and requirements for beginning and terminating collaborative law are specified in
23 Section 4. The defined time period and methods for ascertaining are designed to make it easier
24 for tribunals to determine the applicability of the privilege to a proposed collaborative law
25 communication.
26

27 The definition of collaborative law communication does include some communications
28 that are not made during actual negotiation sessions, such as those made for purposes of
29 convening or continuing a negotiation session after collaborative law begins. It also includes
30 “briefs” and other reports that are prepared by the parties for the collaborative law process.
31

32 Whether a document is prepared for collaborative law is a crucial issue in determining
33 whether it is a “collaborative law communication”. For example, a tax return brought to a
34 collaborative law negotiation session for a divorce settlement would not be a “collaborative law
35 communication,” even though it may have been used extensively in the process, because it was
36 not created for “purposes of conducting, participating in, continuing, or reconvening
37 collaborative law” but rather because it is a requirement of federal law. However, a note written
38 on the tax return to clarify a point for other participants during a negotiation session would be a
39 collaborative law communication. Similarly, a memorandum specifically prepared for the
40 collaborative law process by a party or a party's counsel explaining the rationale behind certain
41 positions taken on the tax return would be a collaborative law communication. Documents
42 prepared for collaborative law by experts retained by the parties would also be covered by this

1 definition.

2
3 **“Collaborative lawyer.”** Parties can sign a collaborative law participation agreement
4 only if they engage a collaborative lawyer. Collaborative law is not an option for self-represented
5 parties. See Preface at [fill in]. A collaborative lawyer must be identified in the agreement and
6 must acknowledge being engaged for the limited purpose of representing a party in collaborative
7 law. See Sections 3(a) (5) and (6).

8
9 **“Law firm.”** This definition of “law firm” is adapted from the definition of the term in
10 the *American Bar Association Model Rules of Professional Conduct* Rule 1.0 (c). It includes
11 lawyers representing governmental entities. It is included to help define the scope of the imputed
12 disqualification requirement of Section 8.

13
14 **“Matter.”** The act uses the term “matter” rather the narrower term “dispute” to describe
15 what the parties may attempt to resolve through collaborative law. Matter can include some or all
16 of the issues in litigation or potential litigation, or can include issues between the parties that
17 have not or may never ripen into litigation. The broader term emphasizes that parties have great
18 autonomy to decide what to submit to collaborative law and encourages them to use
19 collaborative law creatively and broadly.

20
21 The parties must, however, describe the matter that they seek to resolve through
22 collaborative law in their collaborative law participation agreement. See Section 3(a) (3). That
23 requirement is essential to determining the scope of the disqualification requirement for
24 collaborative lawyers under Section 8, which is applicable to the matter and “substantially
25 related” matters, and the application of the evidentiary privilege under Section 14.

26
27 **“Nonparty participant.”** This definition parallels the definition of “nonparty
28 participant” in the Uniform Mediation Act § 2(4). It covers experts, friends, support persons,
29 potential parties, and others who participate in the collaborative law process. Non party
30 participants are entitled to assert a privilege before a tribunal for their own collaborative law
31 communications under Section 14(b)(2). This provision is designed to encourage mental health
32 and financial professionals to participate in collaborative law without fear of becoming
33 embroiled in litigation without their consent should collaborative law terminate.

34
35 Non party participant does not, however, include a collaborative lawyer for a party. A
36 collaborative lawyer maintains a traditional lawyer-client relationship with the party whom they
37 represent and thus the obligation to maintain client confidences and assert evidentiary privilege
38 for client communications. The obligations of professional responsibility for a lawyer are not
39 changed by the lawyer’s representation of a party in collaborative law. Section 17. Under the
40 *Model Rules of Professional Conduct* the attorney-client privilege is held by the client and can
41 only be waived by the client. See MODEL RULES OF PROF CONDUCT R 1.6(a) (2002) (“A lawyer
42 shall not reveal information relating to the representation of a client unless the client gives
43 informed consent...”). See, e.g. *State v. Walen*, 563 N.W.2d 742, 752 (Minn. 1997) (“A client
44 can waive his or her attorney-client privilege either by explicit consent or by implication.”). An
45 attorney does not have the right to override a client's decision to waive privilege, and including

1 collaborative lawyers in the category of non party participants entitled to independently assert
2 privilege might be thought of as changing that traditional view.

3
4 Some states declare ADR neutrals as incompetent to testify about communications in the
5 ADR processes. The declaration of incompetence to testify normally does not apply to lawyers,
6 but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5
7 (West 2008). In Minnesota, the competency standard has been extended to lawyers participating
8 in mediation as well. See MINN. STAT. ANN. § 595.02 1a (West 2008); MINNESOTA RULE OF THE
9 GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS 114.08

10
11 **“Party.”** The act’s definition of “party” is central to determining who has rights and
12 obligations in collaborative law, especially the right to assert the evidentiary privilege for
13 collaborative law communications. Fortunately, parties to collaborative law parties are relatively
14 easy to identify – they are signatories to a collaborative law participation agreement and they
15 engage designated collaborative lawyers.

16
17 Participants in the collaborative law process who do not meet the definition of “party,”
18 such as an expert retained jointly by the parties to provide input, do not have the substantial
19 rights under additional sections that are provided to parties. Rather, these non-party participants
20 are granted a more limited evidentiary privilege under Section 14 (b)(2)- they can prevent
21 disclosure of their own collaborative law communications but not those of parties or others who
22 participate in the process. Parties seeking to apply broader restrictions on disclosures by such
23 participants should consider drafting such a confidentiality obligation into a valid and binding
24 agreement that the participant signs as a condition of participation in the collaborative law
25 process.

26
27 **“Person.”** Section 2 (9) adopts the standard language recommended by the National
28 Conference of Commissioners of Uniform State Laws for the drafting of statutory language, and
29 the term should be interpreted in a manner consistent with that usage.

30
31 **“Proceeding.”** The definition of “proceeding” is drawn from Section 2(7) of the Uniform
32 Mediation Act. Its purpose is to define the adjudicative type proceedings to which the act
33 applies, and should be read broadly to effectuate the intent of the act. It was added to allow the
34 drafters to delete repetitive language throughout the act, such as “judicial, administrative,
35 arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions,
36 conferences, and discovery, or legislative hearings or similar processes.”

37
38 **“Prospective party.”** The definition of “prospective party” is drawn from *American Bar*
39 *Association Model Rules of Professional Conduct* Rule 1.18 (a) which defines a lawyer’s duty to
40 a prospective client. The act uses the term “party” rather than “client” to clarify that it does not
41 change the standards of professional responsibility applicable to lawyers.

42
43 **“Sign.”** The definitions of “record” and “sign” adopt standard language approved by the
44 Uniform Law Conference intended to conform Uniform Acts with the Uniform Electronic
45 Transactions Act (UETA) and its federal counterpart, Electronic Signatures in Global and
46 National Commerce Act (E-Sign). 15 U.S.C § 7001, etc seq. (2000). Both UETA and E-Sign

1 were written in response to broad recognition of the commercial and other uses of electronic
2 technologies for communications and contracting, and the consensus that the choice of medium
3 should not control the enforceability of transactions. These sections are consistent with both
4 UETA and E-Sign. UETA has been adopted by the Conference and received the approval of the
5 American Bar Association House of Delegates. As of December 2001, it had been enacted in
6 more than 35 states. See also Section 11, Relation to Electronic Signatures in Global and
7 National Commerce Act.

8
9 The practical effect of these definitions is to make clear that electronic signatures and
10 documents have the same authority as written ones for such purposes as establishing the validity
11 of a collaborative law participation agreement under section 3, notice to terminate the
12 collaborative law process under section 4(d), party agreements concerning the confidentiality of
13 collaborative law communications under section 13, and party waiver of the collaborative law
14 communication privilege under section 16(a) (1).

15
16 **“Substantially related.”** Under Section 8, a collaborative lawyer and lawyers in a law
17 firm with which the collaborative law is associated are disqualified from representing parties in
18 “substantially related” matters if collaborative law is terminated. The definition of “substantially
19 related” thus determines the scope of the disqualification provision. As previously discussed in
20 detail (see Prefatory Note at) the definition draws upon *American Bar Association Model Rules*
21 *of Professional Conduct* Rule 1.9 which provides that “[a] lawyer who has formerly represented
22 a client in a matter shall not thereafter represent another person in the same or a substantially
23 related matter in which that person’s interests are materially adverse to the interests of the former
24”

25 **“Tribunal.”** The definition of “tribunal” is adapted from *American Bar Association*
26 *Model Rules of Professional Conduct* Rule 1.0 (m). It is included to insure the provisions of this
27 act are applicable in judicial and other forums such as arbitration and is consistent with the broad
28 definition of “proceeding” in subsection (10).
29

30 **SECTION 3. COLLABORATIVE LAW PARTICIPATION AGREEMENT;**
31 **REQUIREMENTS.**

32 (a) A collaborative law participation agreement must:

- 33 (1) be in a record;
- 34 (2) be signed by the parties;
- 35 (3) describe the nature and scope of a matter;
- 36 (4) state the parties’ intention to resolve the matter through collaborative law;
- 37 (5) identify the collaborative lawyer who represents each party in the

1 collaborative law process; and

2 (6) contain a signed acknowledgment by each party's lawyer confirming the
3 lawyer's representation.

4 (b) Parties to a collaborative law participation agreement:

5 (1) may agree to include additional provisions not inconsistent with this [act];

6 and

7 (2) may not agree to waive or vary subsection (a) and Sections 8, 11, and 12.

8 **Comment**

9 A collaborative law participation agreement is a voluntary contract and the fundamental
10 source of the rights and responsibilities of parties. The requirements of subsection (a) set
11 minimum conditions for their validity, designed to insure that a written agreement evidences the
12 parties' agreement and intent to participate in collaborative law. They were formulated to require
13 collaborative law participation agreements to be fundamentally fair, but simple and thus to make
14 collaborative law more accessible to potential parties in a wide variety of areas.

15
16 The requirements that the collaborative law participation agreement be in a signed record,
17 state the parties' intention to engage in collaborative law, describe the matter submitted to
18 collaborative law, and identify the collaborative lawyers are also designed to help tribunals and
19 parties more easily administer and interpret the disqualification and evidentiary privileges
20 provisions of the act. It is, for example, difficult to determine the scope of the disqualification
21 requirement unless the parties describe the matter submitted to collaborative law in their
22 participation agreement.

23
24 Many collaborative law participation agreements are far more detailed than the minimum
25 form requirements of subsection (a) contemplate and contain numerous additional provisions. In
26 the interests of encouraging further continuing growth and development of collaborative law,
27 subsection (b) (1) authorizes additional provisions to be included in participation agreements if
28 they are not inconsistent with the provisions of this section. As discussed in the Prefatory Note
29 () the act leaves questions raised by particular language and form in collaborative law
30 participation agreements to regulation by other sources such as ethics committees.

31
32 Parties are free to supplement the provisions contained in their own particular agreements
33 with additional terms that meet their particular needs and circumstances. For example, they may
34 by contract provide broader protection for the confidentiality of collaborative law
35 communications than the privilege against disclosure in legal proceedings provided in Section
36 14. *See* Prefatory Note at [] and section 11. They may provide, as do many models of
37 collaborative law practice, for the engagement of jointly retained neutral experts to participate in
38 collaborative law and prohibit parties from retaining their own experts,

1 Subsection (b)(2), however, prohibits parties from agreeing to waive or vary the core
2 characteristics of the collaborative law process- the disqualification requirement (section 8),
3 voluntary, informal disclosure of information (section 11), requirements designed to insure
4 informed consent to participate in collaborative law and screening and safety measures for
5 domestic violence (section 12). This provision is analogous to the minimum provisions for valid
6 arbitration agreements, which also cannot be waived. *See* UNIFORM ARBITRATION ACT § 4(b)
7 (provisions parties cannot waive in a pre dispute arbitration clause such as the right to counsel).
8

9 SECTION 4. BEGINNING AND TERMINATING COLLABORATIVE LAW.

10 (a) A collaborative law process begins when parties sign a collaborative law
11 participation agreement.

12 (b) A party may terminate a collaborative law process with or without cause.

13 (c) A collaborative law process terminates when all parties have or should have a
14 reasonable belief that the process is over because:

15 (1) a party:

16 (A) terminates the process; or

17 (B) without the agreement of all other parties

18 (i) begins a proceeding substantially related to the matter; or

19 (ii) initiates a pleading, motion, order to show cause, request for a
20 conference with the tribunal, request that the proceeding be put on a tribunal's active calendar or
21 takes similar action in a pending proceeding substantially related to the matter; or

22 (2) except as otherwise provided by subsection (e), a party discharges a
23 collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

24 (d) A party that terminates a collaborative law process or a collaborative lawyer who
25 withdraws from further representation of a party shall provide prompt written notice of the
26 termination to all other parties and collaborative lawyers. The notice must not specify a reason
27 for terminating the process.

1 (e) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a
2 collaborative law process continues if not later than 30 days after the date that the written notice
3 required by subsection (d) is received by the parties:

4 (1) the unrepresented party engages a successor collaborative lawyer;

5 (2) all parties in a signed record consent to continue the process by reaffirming
6 the collaborative law participation agreement;

7 (3) the agreement is amended in a signed record to identify the successor
8 collaborative lawyer; and

9 (4) the successor collaborative lawyer accepts the representation in a signed
10 record.

11 (f) A collaborative law process does not terminate if, with the consent of all parties, a
12 party asks a tribunal through appropriate procedures such as commencing a proceeding or filing
13 a motion in a pending proceeding to approve an agreement or sign orders to carry out an
14 agreement that results from the process.

15 (g) A collaborative law participation agreement may provide additional methods of
16 terminating a collaborative law process.

17 **Comment**

18 Section 4 is designed to make it as administratively easy for parties and tribunals as
19 possible consistent with fundamental fairness to determine when collaborative law begins and
20 ends by linking those events to written documents communicated between the parties and
21 collaborative lawyers. Establishing the beginning and end of the collaborative law process is
22 particularly important for application of the evidentiary privilege for collaborative law
23 communications recognized by section 14 which applies only to communications in that period.
24

25 Thus, a party who terminates collaborative law is required to give prompt written notice
26 of termination of the process. The act envisions, however, the possibility of failures in the
27 process of giving written notice. A party may, for example, try to orally terminate collaborative
28 law without giving the written notice of termination required by this section. Or the notice may
29 get lost in the mail or be received long after an oral communication of termination. To deal with

1 such contingencies, Section 4(c) makes the ultimate date of termination when “all parties have or
2 should have a reasonable belief” that the process is terminated. Usually, that date will be
3 determined by the date of receipt of the written notice. If it is not, however, a tribunal must
4 determine when the parties reasonably believed the collaborative law process was terminated
5 based on the totality of their communications.
6

7 Section 4 (e) also allows for continuation of collaborative law if a party and a
8 collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative
9 lawyer is engaged in a defined period of time and under conditions and with documentation
10 which indicate that the parties want the collaborative law process to continue.
11

12 Section 4(f) allows all parties to agree to take action to present an agreement resulting
13 from collaborative law to a tribunal for approval under section 7 without terminating
14 collaborative law. Read together, these sections allow, for example, collaborative lawyers in
15 divorce proceedings to present uncontested settlement agreements to the court for approval and
16 incorporation into a court order as local practice dictates. The collaborative law process - and
17 the evidentiary privilege for collaborative law communications- is not terminated by presentation
18 of the settlement agreement to the court.
19

20 **SECTION 5. COLLABORATIVE LAW AND PROCEEDINGS PENDING**

21 **BEFORE TRIBUNAL; STATUS REPORTS.**

22 (a) Parties to a proceeding pending before a tribunal may sign a collaborative law
23 participation agreement to negotiate about a matter substantially related to the proceeding.

24 Parties shall promptly file a notice of collaborative law with the tribunal after the collaborative
25 law participation agreement is signed. Subject to subsection (c) and Section 6, the filing shall
26 operate as a stay of the proceeding.

27 (b) Parties shall file promptly a written notice of termination with the tribunal when a
28 collaborative law process terminates. The stay of the proceeding created by subsection (a) is
29 lifted when the notice is filed with the tribunal. The notice must not specify any reason for the
30 termination.

31 (c) A tribunal may require parties to provide status reports on the proceeding.

32 (1) Except as authorized by paragraph (2), a status report may not include a
33 report, assessment, evaluation, recommendation, finding, or other communication regarding a

1 collaborative law process.

2 (2) A status report to a tribunal may require parties and lawyers to disclose:

3 (A) whether the process is occurring or has terminated and whether an
4 agreement was reached; or

5 (B) a collaborative law communication as permitted under Section 16.

6 (3) A communication made in violation of subsection (c)(1) may not be
7 considered by a tribunal.

8 (d) A tribunal shall not dismiss a pending proceeding in which a notice of a collaborative
9 law is filed based on failure to prosecute or delay without providing parties appropriate notice
10 and an opportunity to be heard.

11 **Comment**

12 This section authorizes parties to enter into a collaborative law participation agreement to
13 attempt to resolve matters in pending proceedings. To give the collaborative law process time
14 and breathing space to operate, it creates a stay of proceedings from the time the tribunal
15 receives written notice that the parties have executed a collaborative law participation agreement
16 until it receives written notice that collaborative law is terminated. The stay of proceedings is
17 qualified by Section 6, which authorizes a tribunal to issue emergency orders notwithstanding the
18 stay.

19
20 This Section is based on court rules and statutes recognizing collaborative law in a
21 number of jurisdictions. *See* CAL. FAM. CODE § 2013 (2007); N.C. GEN. STAT. §§ 50-70 -79
22 (2006); TEX. FAM. CODE §§ 6.603, 153.0072 (2006); CONTRA COSTA, CA., LOCAL CT. RULE 12.5
23 (2007); L.A., CAL., LOCAL CT. RULE, ch. 14, R. 14.26 (2007); S.F., CAL., UNIF. LOCAL RULES OF
24 CT. R. 11.17 (2006); SONOMA COUNTY, CAL., LOCAL CT. RULE 9.25 (2006); EAST BATON
25 ROUGE, LA., UNIF. RULES FOR LA. DIST. CT. tit. IV, § 3 (2005); UTAH, CODE OF JUD. ADMIN. ch.
26 4, art. 5, R. 40510 (2006); Eighteenth Judicial Circuit Administrative Order No. 07-20-B, *In re*
27 *Domestic Relations – Collaborative Dispute Resolution in Dissolution of Marriage Cases* (June
28 25, 2007); MINN. R. GEN. PRAC 111.05 & 304.05 (2008).

29
30 Section 5 (c) authorizes a tribunal to ask for status reports on pending proceedings while
31 the stay created by the notice of collaborative law is in effect. This section also puts limitations
32 on the scope of the information that can be requested by the status report to insure the
33 confidentiality of the collaborative law process and that it is not influenced by communications
34 to or from the tribunal. The provisions of this section are based on section 7 of the Uniform
35 Mediation Act, adapted for collaborative law. Section 5(c) recognizes that the tribunal asking for

1 the status report may rule on the dispute being negotiated in collaborative law and should not be
2 influenced by the behavior of the parties or counsel in collaborative law. Its provisions would not
3 permit the tribunal to ask in a status report whether a particular party engaged in "good faith"
4 negotiation, or to state whether a party had been "the problem" in reaching a settlement. The
5 status report can ask for non substantive information related to scheduling and information that is
6 an exception to the privilege for collaborative law communications set forth in Section 16, most
7 of which involve threats to bodily integrity or commission of a crime.

8
9 Some jurisdictions use statistical analysis of the timeliness of case dispositions to
10 evaluate judicial performance and sometimes those statistics are made available to the public.
11 See COLO. REV. STAT. § 13-5.5-103 (2008), COLO. REV. STAT. § 13-5.5-105 (2008), Commission
12 on Judicial Performance, <http://www.cojudicialperformance.com/index.cfm>; UTAH CT. R. 3-
13 111.02 (2008); UTAH CT. R. 3-111.01. Judicial administrators are encouraged to recognize that
14 while cases in which a collaborative law participation agreement is executed are technically
15 "pending" they should not be considered under active judicial management for statistical or
16 evaluation purposes until the collaborative law process is terminated.

17
18 **SECTION 6. EMERGENCY ORDERS.** During a collaborative law process a tribunal
19 may issue emergency orders to protect the health, safety, welfare or interests of a party or family
20 or household member as defined in [state civil protection order statute].

21 **Comment**

22 This Section is one of the act's provisions addressing the safety needs of victims of
23 domestic violence in collaborative law. See Prefatory Note at . It is based on the concern that a
24 party in collaborative law may be a victim of domestic violence or a dependent of a party such as
25 a child may be threatened with abuse or abduction while the collaborative law process is
26 ongoing. A party should not be left without access to the court during such emergency, despite
27 the stay of proceedings created by filing a notice of collaborative law with a tribunal.

28
29 The reach of this Section is not limited to victims of violence themselves. It is intended to
30 extend to members of their families and households. Each state is free to define the scope of this
31 section by cross referencing its civil protection order statute. Compare CAL. FAM. CODE § 6211
32 (West 2008) (defining family or household member to include current and former spouses,
33 cohabitants, and persons in a dating relationship, as well as persons with a child in common, or
34 any other person related by blood or marriage), and WASH. REV. CODE ANN. § 26.50.010 (West
35 2009) (includes current and former spouses, domestic partners, and cohabitants, persons with a
36 child in common, persons in a current or former dating relationship, and persons related by blood
37 or marriage), and S.C. CODE ANN. § 20-4-20(b) (2008) (defining family or household member to
38 mean current or former spouses, persons with a child in common, or a male and female who are
39 or were cohabiting).

40
41 The reach of this section is also not limited to emergencies involving threats to physical

1 safety. The term “interests” encompasses financial interests or reputational interests as well. This
2 section, in effect, authorizes a tribunal to issue emergency provisional relief to protect a party in
3 any critical area as it would in any civil dispute despite the stay of proceedings created by the
4 filing of a notice of collaborative law. A party who finds out that another party is secretly looting
5 assets from a business, for example, while participating in collaborative law can seek an
6 emergency restraining order under this section and the court is authorized to grant it,
7

8 **SECTION 7. TRIBUNAL APPROVAL OF AGREEMENT.** If requested by all
9 parties, a tribunal may carry out an agreement and sign orders to effectuate an agreement
10 resulting from a collaborative law process.

11 **Comment**

12 Section 4(f) authorizes parties who reach agreements in collaborative law to present them
13 to a tribunal for approval without terminating collaborative law. It also authorizes the tribunal to
14 review and approve the agreement of the parties if required by law, as in, for example, many
15 divorce settlements, settlements of infants’ estates, or class action settlements. See Robert H.
16 Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. L.J. REF. 1015
17 (1985); Uniform Marriage and Divorce Act § 306 (d) (2008) (Parties agreement may be
18 incorporated into the divorce decree if the court finds that it is not “unconscionable” regarding
19 the property and maintenance and not “unsatisfactory” regarding support); FED. R. CIV. P.
20 23(e)(1)(C) (standard for judicial evaluation of settlement of a class action, which is that the
21 settlement must not be a result of fraud or collusion and that the settlement must be fair,
22 adequate, and reasonable).
23

24 *Legislative Note: In states where judicial procedures for management of proceedings can be*
25 *prescribed only by court rule or administrative guideline and not by legislative act, the duties of*
26 *courts and other tribunals listed in Sections 5-7 should be adopted by the appropriate measure.*
27

28 **SECTION 8. DISQUALIFICATION OF COLLABORATIVE LAWYER AND**
29 **LAWYERS IN ASSOCIATED LAW FIRM.**

30 (a) Except as otherwise provided in subsection (c), after a collaborative law process
31 terminates, a collaborative lawyer may not:

32 (1) appear before a tribunal to represent a party in a proceeding substantially
33 related to the matter; or

34 (2) represent the party in the matter or substantially related matter.

1 (b) Except as otherwise provided in subsection (c) and Sections 9 and 10, a lawyer in a
2 law firm with which the collaborative lawyer is associated may not knowingly represent a party
3 in a matter or substantially related matter and may not appear before a tribunal to represent a
4 party in a proceeding substantially related to a matter if the collaborative lawyer is disqualified
5 from doing so by subsection (a).

6 (c) A collaborative lawyer or a lawyer in a law firm with which a collaborative lawyer is
7 associated may represent a party:

8 (1) if agreed to by all parties, to ask a tribunal to approve an agreement or sign
9 orders to carry out an agreement resulting from a collaborative law process; or

10 (2) to seek an emergency order to protect the health, safety, welfare, or interests
11 of a party or family or household member as defined in [state civil protection order statute] if a
12 successor lawyer is not immediately available to represent that person. In that event, the
13 provisions of subsections (a) and (b) apply when the party, family or household member is
14 represented by a successor lawyer or reasonable measures are taken to adequately protect the
15 health, safety, welfare, or interests of that person.

16 **Comment**

17 The disqualification requirement for collaborative lawyers after collaborative law
18 terminates is a fundamental defining characteristic of collaborative law. It cannot be waived by
19 parties entering into collaborative law participation agreements. See discussion under section 3
20 above.

21
22 As previously discussed (Prefatory Note at) this section also extends the disqualification
23 provision to lawyers in a law firm with which the collaborative lawyer is associated addition to
24 the lawyer him or herself, the so called “imputed disqualification” rule. It also extends to
25 “substantially related matters” in addition to the matter described in the collaborative law
26 participation agreement.

27
28 Appropriate exceptions to the disqualification requirement are made for emergency
29 orders (see section 6) and to allow collaborative lawyers to present agreements to a tribunal for
30 approval (section 7).

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SECTION 9. LOW INCOME PARTIES. After a collaborative law process terminates a lawyer in a law firm with which the collaborative lawyer is associated may represent a party who has an annual income which does not exceed one hundred and twenty-five percent (125%) of the current Federal Poverty Guidelines amounts without fee in the matter or a substantially related matter if:

- (a) the collaborative law participation agreement so provides; and
- (b) the collaborative lawyer is isolated from any participation in the matter or substantially related matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

Legislative Note: States may modify the income limitation stated in this Section higher or lower than the illustrative figure chosen. They should do so as appropriate in light of their own definition of low income clients who are eligible for free legal representation by legal aid societies in civil matters

Comment

As previously discussed (Prefatory Note at), this Section modifies the imputed disqualification requirement for low income parties that a collaborative lawyer represents without fee. The Section allows lawyers in the legal aid office, law school clinic or law firm which represents the client *pro bono* can continue to represent the low income party if the individual collaborative lawyer is screened from the continuing representation of the low income party. All parties must agree to this relaxation of the imputed disqualification rule in advance in their collaborative law participation agreement.

The modification to the imputed disqualification requirement is limited to the very poor and to lawyers who represent the poor without fee and is justified because of the difficulty low income parties will have in securing successor counsel if collaborative law terminates. For example, Legal Aid in many jurisdictions currently represents individuals who do not make more than 125% of the federal poverty guidelines.

<http://www.legalaid.org/en/aboutus/legalaidsocietyfaq.aspx>. The following chart shows 125% of the poverty line for families of different sizes using the 2008 guidelines:

Size of Family Unit	Poverty Guidelines	125 Percent
1	\$10,400	\$13,000

1	2	\$14,000	\$17,500
2			
3	3	\$17,600	\$22,000
4			
5	4	\$22,200	\$26,500
6			
7	5	\$24,800	\$31,000
8			
9	6	\$28,400	\$35,500
10			
11	7	\$32,000	\$40,000
12			
13	8	\$35,600	\$44,500
14			

15 http://travel.state.gov/visa/immigrants/info/info_1327.html

16
17 Thus, under this Section, the imputed disqualification requirement would be modified
18 when the combined income of spouses seeking a divorce through collaborative law does not
19 exceed \$17,500 per year.

20
21 **SECTION 10. GOVERNMENT ENTITIES AS PARTIES.**

22 (a) The disqualification requirements of Section 8 (a) apply to a collaborative lawyer
23 representing a party that is a government or governmental subdivision, agency, or
24 instrumentality.

25 (b) After a collaborative law process terminates, a lawyer in a law firm with which the
26 collaborative lawyer is associated may represent a party described in subsection (a) in the matter
27 or a substantially related matter if:

- 28 (1) the collaborative law participation agreement so provides; and
- 29 (2) the collaborative lawyer is isolated from any participation in the matter or
30 substantially related matter through procedures within the law firm which are reasonably
31 calculated to isolate the collaborative lawyer from such participation.

32 **Comment**

33 The rationale for creating an exception to the imputed disqualification rule when a
34 collaborative lawyer represents a government entity is explained in the Prefatory Note at []. This

1 Section will allow lawyers in an agency with the collaborative lawyer is associated to continue to
2 represent the government if collaborative law terminates, thus sparing taxpayers the expense of
3 outside counsel. All parties must consent in advance to the relaxation of the imputed
4 disqualification rule and the collaborative lawyer must be screened from further participation in
5 the matter or related matters.
6

7 **SECTION 11. DISCLOSURE OF INFORMATION IN COLLABORATIVE LAW.**

8 During a collaborative law process upon the request of another party a party shall make timely,
9 full, candid, and informal disclosure of information substantially related to a matter without
10 formal discovery, and shall update promptly information which has materially changed.

11 **Comment**

12 Voluntary informal disclosure of information related to a matter is a defining
13 characteristic of collaborative law. The rationale for this section is described in the Prefatory
14 Note at []. Like the disqualification requirement, it cannot be waived by the parties. See Section
15 3(b)(2).
16

17 **SECTION 12. REQUIRED DISCLOSURES CONCERNING COLLABORATIVE**
18 **LAW; DOMESTIC VIOLENCE.**

19 (a) Before a prospective party executes a collaborative law participation agreement, a
20 prospective collaborative lawyer shall:

21 (1) provide the party with sufficient information to make an informed decision
22 about the material benefits and risks of collaborative law as compared to the material benefits
23 and risks of other reasonably available alternatives for resolving the matter such as litigation,
24 mediation, arbitration, or expert evaluation;

25 (2) advise the party that:

26 (A) after signing an agreement:

27 (i) if a party initiates a proceeding or seeks tribunal
28 intervention in a pending proceeding substantially related to the matter, the collaborative law

1 process terminates; and

2 (ii) the collaborative lawyer and a lawyer in a law firm with which
3 the collaborative lawyer is associated may not represent a party before a tribunal in such a
4 proceeding except as authorized by Section 8(c), 9, or 10(b);

5 (B) any party has the right to unilaterally terminate a collaborative law
6 process with or without cause;

7 (C) if the process terminates, a collaborative lawyer and a lawyer in a law
8 firm with which the collaborative lawyer is associated are disqualified from further
9 representation of a party in the matter or substantially related matter except as authorized by
10 Section 8(c), 9, or 10(b).

11 (3) inquire about and discuss with the prospective party factors relevant to
12 whether collaborative law is appropriate for the prospective party's matter.

13 (b) A collaborative lawyer shall make reasonable efforts to determine whether a
14 prospective party has a history of domestic violence with another prospective party before a
15 prospective party signs a collaborative law participation agreement and shall continue throughout
16 the collaborative law process to assess for the presence of domestic violence.

17 (c) If a collaborative lawyer reasonably believes that a prospective party or party has a
18 history of domestic violence with another party or prospective party, the lawyer may not begin or
19 continue a collaborative law process unless:

20 (1) the prospective party or party requests beginning or continuing a collaborative
21 law process;

22 (2) the lawyer reasonably believes that the safety of the prospective party or party
23 can be adequately protected during a collaborative law process; and

1 (3) the lawyer is familiar with the American Bar Association’s Standards of
2 Practice for Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil
3 Protection Order Cases; Standards of Practice for Lawyers Who Represent Children in Abuse
4 and Neglect Cases; and Standards of Practice for Lawyers Who Represent Parents in Abuse and
5 Neglect Cases.

6 **Comment**

7
8 The act’s philosophy of encouraging parties to participate in collaborative law with
9 “informed consent” by setting a minimum floor for a prospective collaborative lawyer to
10 facilitate it that underlies subsection (a) is described in Prefatory Note at [].

11
12 Subsections (b) and (c) are part of the act’s overall approach to assuring safety for
13 victims of domestic violence who are prospective parties or parties in collaborative law. See
14 Prefatory Note at [].

15
16 **SECTION 13. CONFIDENTIALITY OF COLLABORATIVE LAW**

17 **COMMUNICATION.** A collaborative law communication is confidential to the extent agreed
18 by the parties in a signed record or as provided by law of this state other than this [act].

19 **Comment**

20 As previously discussed (Prefatory Note at []), the act creates an evidentiary privilege for
21 collaborative law communications that prevents them from being admitted into evidence in legal
22 proceedings. The drafters believe that a statute is required only to assure that aspect of
23 confidentiality relating to evidence compelled in judicial and other legal proceedings. This
24 Section encourages parties to collaborative law to reach agreement on broader confidentiality
25 matters between themselves.

26
27 **SECTION 14. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE**
28 **LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.**

29 (a) Subject to Section 15 or 16, a collaborative law communication is privileged as
30 provided in subsection (b) and is not subject to discovery or admissible in evidence in a
31 proceeding.

1 (b) In a proceeding, the following privileges apply:

2 (1) A party may refuse to disclose, and may prevent any other person from
3 disclosing, a collaborative law communication.

4 (2) A nonparty participant may refuse to disclose, and may prevent any other
5 person from disclosing, a collaborative law communication of the nonparty participant.

6 (c) Evidence or information that is otherwise admissible or subject to discovery does not
7 become inadmissible or protected from discovery solely by reason of its disclosure or use in a
8 collaborative law process.

9 **Comment**

10 *Overview*

11
12 Section 14 sets forth the act's general structure for creating a privilege prohibiting
13 disclosure of collaborative law communications in legal proceedings. It is based on similar
14 provisions in the Uniform Mediation Act, whose commentary should be consulted for more
15 expansive discussion of the issues raised and resolved in the drafting of the confidentiality
16 provisions of this act.

17
18 *Holders of the Privilege for Collaborative Law Communications*

19
20 *Parties*

21
22 Parties are holders of the collaborative law communications privilege. The privilege of
23 the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in
24 that its paramount justification is to encourage candor by the parties, just as encouraging the
25 client's candor is the central justification for the attorney-client privilege. Using the attorney-
26 client privilege as a core base for the collaborative law communications privilege is also
27 particularly appropriate since the extensive participation of attorneys is a hallmark of
28 collaborative law.

29
30 The analysis for the parties as holders appears quite different at first examination from
31 traditional communications privileges because collaborative law involves parties whose interests
32 appear to be adverse, such as marital partners now seeking a divorce. However, the law of
33 attorney-client privilege has considerable experience with situations in which multiple-client
34 interests may conflict, and those experiences support the analogy of the collaborative law
35 communications privilege to the attorney-client privilege. For example, the attorney-client
36 privilege has been recognized in the context of a joint defense in which interests of the clients
37 may conflict in part and yet one may prevent later disclosure by another. *See Raytheon Co. v.*

1 Superior Court, 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (1989); *United States v. McPartlin*, 595
2 F.2d 1321 (7th Cir. 1979); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So.2d 437 (Fla. App.
3 1987); *but see Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App. 1985) (refusing to apply the
4 joint defense doctrine to parties who were not directly adverse); *see generally Patricia Welles, A*
5 *Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981).
6 Similarly, the attorney-client privilege applies in the insurance context, in which an insurer
7 generally has the right to control the defense of an action brought against the insured, when the
8 insurer may be liable for some or all of the liability associated with an adverse verdict.
9 *Desriusseaux v. Val-Roc Truck Corp.*, 230 A.D.2d 704 (N.Y. Sup. Ct. 1996); PAUL R. RICE,
10 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, 4:30-4:38 (2d ed. 1999).

11 12 *Nonparty Participants Such as Experts*

13
14 Of particular note is the act's addition of a privilege for the nonparty participant, though
15 limited to the communications by that individual in the collaborative law process. Joint party
16 retention of experts to perform various functions is a feature of some models of collaborative
17 law, and this provision encourages and accommodates it. Extending the privilege to nonparties
18 seeks to facilitate the candid participation of experts and others who may have information and
19 perspective that would facilitate resolution of the matter. This provision would also cover
20 statements prepared by such persons for the collaborative law process and submitted as part of it,
21 such as experts' reports. Any party who expects to use such an expert report prepared to submit
22 in a collaborative law process later in a legal proceeding would have to secure permission of all
23 parties and the expert in order to do so. This is consistent with the treatment of reports prepared
24 for a collaborative law process as collaborative law communications. *See* Section 2 (2).

25 26 *Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable* 27 *Evidence*

28
29 Section 14 (c) concerning evidence otherwise discoverable and admissible makes clear
30 that relevant evidence may not be shielded from discovery or admission at trial merely because it
31 is communicated in a collaborative law process. For purposes of the collaborative law
32 communication privilege, it is the communication that is made in the collaborative law process
33 that is protected by the privilege, not the underlying evidence giving rise to the communication.
34 Evidence that is communicated in collaborative law is subject to discovery, just as it would be if
35 the collaborative law process had not taken place. There is no "fruit of the poisonous tree"
36 doctrine in the collaborative law communication privilege. For example, a party who learns
37 about a witness during a collaborative law proceeding is not precluded by the privilege from
38 subpoenaing that witness should collaborative law terminate and the matter wind up in a
39 courtroom.

40 41 **SECTION 15. WAIVER AND PRECLUSION OF PRIVILEGE.**

42 (a) A privilege under Section 14 may be waived in a record or orally during a proceeding
43 if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it

1 is also expressly waived by the nonparty participant.

2 (b) A person that discloses or makes a representation about a collaborative law
3 communication that prejudices another person in a proceeding may not assert a privilege under
4 Section 14, but only to the extent necessary for the person prejudiced to respond to the disclosure
5 or representation.

6 (c) A person that intentionally uses a collaborative law process to commit, or attempt to
7 commit, or to plan a crime, or to conceal an ongoing crime or ongoing criminal activity may not
8 assert a privilege under Section 14.

9 **SECTION 16. EXCEPTION TO PRIVILEGE.**

10 (a) There is no privilege under Section 14 for a collaborative law communication that is:

11 (1) in an agreement evidenced by a record signed by all parties;

12 (2) available to the public under [state open records act] or made during a session
13 of a collaborative law process which is open, or is required by law to be open, to the public;

14 (3) a threat or statement of a plan to inflict bodily injury or commit a crime of
15 violence;

16 (4) intentionally used to plan a crime, attempt to commit or commit a crime, or
17 conceal an ongoing crime or ongoing criminal activity;

18 (5) sought or offered to prove or disprove a claim or complaint of professional
19 misconduct or malpractice arising from or related to a collaborative law process; or

20 (6) sought or offered to prove or disprove abuse, neglect, abandonment, or
21 exploitation of a child unless the [child or adult protective services agency] is a party to or
22 otherwise participates in a collaborative law process.

23 (b) There is no privilege under Section 14 if a tribunal finds, after a hearing in camera,

1 that the party seeking discovery or the proponent of the evidence has shown the evidence is not
2 otherwise available, the need for the evidence substantially outweighs the interest in protecting
3 confidentiality, and the collaborative law communication is sought or offered in:

- 4 (1) a court proceeding involving a felony [or misdemeanor]; or
- 5 (2) a proceeding seeking rescission or reformation of a contract arising out of the
6 collaborative law process or on which a defense to avoid liability on a contract is asserted.

7 (c) If a collaborative law communication is not privileged under subsection (a) or (b),
8 only the portion of the communication necessary for the application of the exception from
9 nondisclosure may be admitted.

10 (d) Admission of evidence under subsection (a) or (b) does not render the evidence, or
11 any other collaborative law communication, discoverable or admissible for any other purpose.

12 (e) The privileges under Section 14 do not apply if the parties agree in advance in a
13 signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a
14 collaborative law process is not privileged. Section 14 applies to a collaborative law
15 communication made by a person that has not received actual notice of the agreement before the
16 communication is made.

17 **Comment**

18 *Unconditional Exceptions to Privilege*

19
20 The act articulates specific and exclusive exceptions to the broad grant of privilege
21 provided to collaborative law communications. They are based on limited but vitally important
22 values such as protection against serious bodily injury, crime prevention and the right of
23 someone accused of professional misconduct to respond that outweigh the importance of
24 confidentiality in the collaborative law process. The exceptions are identical to those contained
25 in the Uniform Mediation Act.

26
27 As with other privileges, when it is necessary to consider evidence in order to determine
28 if an exception applies, the act contemplates that a court will hold an in camera proceeding at
29 which the claim for exemption from the privilege can be confidentially asserted and defended.

1
2 *Exception to Privilege for Written, But Not Oral, Agreements*
3

4 Of particular note is the exception that permits evidence of a signed agreement, such as
5 the collaborative law participation agreement or, more commonly, written agreements
6 memorializing the parties' resolution of the matter in collaborative law. The exception permits
7 such an agreement to be introduced in a subsequent proceeding convened to determine whether
8 the terms of that settlement agreement had been breached.
9

10 The words “agreement evidenced by a record” and “signed” in this exception refer to
11 written and executed agreements, those recorded by tape recording and ascribed to by the parties
12 on the tape, and other electronic means to record and sign, as defined in Sections 2 (12) and 2
13 (13). In other words, a party’s notes about an oral agreement would not be a signed agreement.
14 On the other hand, the following situations would be considered a signed agreement: a
15 handwritten agreement that the parties have signed, an e-mail exchange between the parties in
16 which they agree to particular provisions, and a tape recording in which they state what
17 constitutes their agreement.
18

19 This exception is noteworthy only for what is not included: oral agreements. The
20 disadvantage of exempting oral settlements is that nearly everything said during a collaborative
21 law session could bear on either whether the parties came to an agreement or the content of the
22 agreement. In other words, an exception for oral agreements has the potential to swallow the
23 rule of privilege. As a result, parties might be less candid, not knowing whether a controversy
24 later would erupt over an oral agreement.
25

26 Despite the limitation on oral agreements, the act leaves parties other means to preserve
27 the agreement quickly. For example, parties can state their oral agreement into the tape recorder
28 and record their assent. One would also expect that counsel will incorporate knowledge of a
29 writing requirement into their collaborative law representation practices.
30

31 *Case by Case Exceptions*
32

33 The exceptions in section 16(a) apply regardless of the need for the evidence because
34 society's interest in the information contained in the collaborative law communications may be
35 said to categorically outweigh its interest in the confidentiality of those communications. In
36 contrast, the exceptions under section 16(b) would apply only in situations where the relative
37 strengths of society's interest in a collaborative law communication and a party’s interest in
38 confidentiality can only be measured under the facts and circumstances of the particular case.
39 The act places the burden on the proponent of the evidence to persuade the court in a non-public
40 hearing that the evidence is not otherwise available, that the need for the evidence substantially
41 outweighs the confidentiality interests and that the evidence comes within one of the exceptions
42 listed under section 16(b). In other words, the exceptions listed in section 16(b) include
43 situations that should remain confidential but for overriding concerns for justice.
44

45 *Limited Preservation of Party Autonomy Regarding Confidentiality*
46

1 Section 16(e) allows the parties to opt for a non-privileged collaborative law process or
2 session of the collaborative law process by mutual agreement, and thus furthers the act's policy
3 of party self-determination. If the parties so agree, the privilege sections of the act do not apply,
4 thus fulfilling the parties reasonable expectations regarding the confidentiality of that session.
5 Parties may use this option if they wish to rely on, and therefore use in evidence, statements
6 made during the collaborative law process. It is the parties and their collaborative lawyers who
7 make this choice. Even if the parties do not agree in advance, they and all nonparty participants
8 can waive the privilege pursuant to section 15(a).

9
10 If the parties want to opt out, they should inform the nonparty participants of this
11 agreement, because without actual notice, the privileges of the act still apply to the collaborative
12 law communications of the persons who have not been so informed until such notice is actually
13 received. Thus, for example, if a nonparty participant has not received notice that the opt-out has
14 been invoked, and speaks during the collaborative law process that communication is privileged
15 under the act. If, however, one of the parties tells the nonparty participant that the opt-out has
16 been invoked, the privilege no longer attaches to statements made after the actual notice has been
17 provided, even though the earlier statements remain privileged because of the lack of notice.
18

19 **SECTION 17. COLLABORATIVE LAW PARTICIPATION AGREEMENT NOT**
20 **MEETING REQUIREMENTS.**

21 (a) Although a collaborative law participation agreement fails to meet the requirements
22 of Section 3, or a lawyer's fails to comply with the disclosure requirements of Section 12, a
23 tribunal may find that the parties:

- 24 (1) signed a record indicating an intention to enter into a collaborative law
25 participation agreement;
26 (2) intended to enter into a collaborative law participation agreement; and
27 (3) reasonably believed they were participating in a collaborative law process.

28 (b) If a tribunal makes the findings specified in subsection (a), and the interests of justice
29 require, the tribunal may:

- 30 (1) enforce an agreement resulting from the process in which the parties
31 participated;
32 (2) apply the disqualification provisions of Section 8, 9 or 10; or

1 (3) apply the evidentiary privilege of Section 14.

2 **Comment**

3 Section 3 of the act sets forth minimum requirements for a collaborative law participation
4 agreement and Section 12 sets forth requirements for disclosures and screening for domestic
5 violence that a lawyer must satisfy to help secure informed party consent to participate in
6 collaborative law. Section 17 anticipates that, as collaborative law expands in use and popularity,
7 claims will be made that agreements reached in collaborative law should not be enforced,
8 collaborative lawyers should not be disqualified and evidentiary privilege should not be
9 recognized because of the failure of collaborative lawyers to meet these requirements. This
10 Section takes the view that while parties should not be forced to participate in collaborative law
11 involuntarily, the failures of collaborative lawyers in drafting agreements and making disclosures
12 should not be visited on parties whose conduct indicates an intention to participate in
13 collaborative law.

14
15 By analogy to the doctrine established concerning enforcement of arguably flawed
16 arbitration agreements, the burden of proof is on the party seeking to enforce the collaborative
17 law participation agreement despite the failures of form or disclosure. See *Layton-Blumenthal,*
18 *Inc. v. Jack Wasserman Co.*, 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) (“The burden is upon
19 a party applying to compel another to arbitrate, to establish that there was a plain intent by
20 agreement to limit the parties to that method of deciding disputes”), and *Fleetwood Enterprises,*
21 *Inc. v. Bruno*, 784 So.2d 277, 280 (Ala. 2000) (“The party seeking to compel arbitration has the
22 burden of proving the existence of a contract calling for arbitration”).

23
24 To invoke this Section the tribunal must find that a signed record- usually a written
25 agreement- indicating an intention to participate in collaborative law exists. It cannot find that
26 the parties entered into collaborative law entirely on the basis of an oral agreement. The tribunal
27 must also find that, despite the failings of the participation agreement or the required disclosures,
28 the parties nonetheless intended to participate in collaborative law and reasonably believed that
29 they were doing so. If the tribunal makes those findings this Section gives it the discretionary
30 authority to enforce agreements and the provisions of this act if the tribunal also finds that the
31 interests of justice so require.

32
33 **SECTION 18. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND**
34 **MANDATORY REPORTING.**

35 (a) The professional responsibility obligations and standards of a lawyer are not changed
36 because of the lawyer’s representation of a party in a collaborative law process.

37 (b) The professional responsibility obligations and standards applicable to any licensed
38 professional who participates in collaborative law as a nonparty participant are not changed

1 because of that participation.

2 (c) The obligation of a person to report abuse or neglect of a child or adult under the
3 laws of this state is not changed by the person’s participation in collaborative law.

4 **Comment**

5 The relationship between the act and the standards of professional responsibility for
6 collaborative lawyers is discussed in the Prefatory Note at []. In the interests of clarity, this
7 section reaffirms that the act does not change the professional responsibility or child abuse and
8 neglect reporting obligations of all professionals, lawyers and non lawyers alike, who participate
9 in collaborative law.
10

11 **SECTION 19. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
12 applying and construing this uniform act, consideration must be given to the need to promote
13 uniformity of the law with respect to its subject matter among states that enact it.

14 **Comment**

15
16 One of the goals of the Uniform Collaborative Law Act is to make the law uniform
17 among the States. However, the drafters contemplate the act will serve as a floor for
18 collaborative law participation agreements rather than a ceiling, one that provides a uniform
19 starting point for collaborative law but which respects diversity and the need for future
20 development of this emerging dispute resolution option.
21

22 While the drafters recognize that some such variations of collaborative law are inevitable
23 given its dynamic and diverse nature and early stage of development, the specific benefits of
24 uniformity of law should also be emphasized. As discussed in the Prefatory Note (at []), uniform
25 adoption of this act will make the law governing collaborative law more accessible and certain in
26 key areas and will thus encourage parties to participate in collaborative law. Collaborative
27 lawyers and parties will know the standards under which collaborative law participation
28 agreements will be enforceable and courts can reasonably anticipate how the statute will be
29 interpreted. Moreover, uniformity of the law will provide greater protection of collaborative law
30 than any one state has the capacity to provide. No matter how much protection one state affords
31 confidentiality of collaborative law communications, for example, the communication will not be
32 protected against compelled disclosure in another state if that state does not have the same level
33 of protection.
34

35 **SECTION 20. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
36 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal

1 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et. Seq,
2 but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or
3 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
4 U.S.C. Section 7003(b).

5 **SECTION 21. SEVERABILITY CLAUSE.** If any provision of this [act] or its
6 application to any person or circumstance is held invalid, the invalidity does not affect other
7 provisions or applications of this [act] which can be given effect without the invalid provision or
8 application, and to this end the provisions of this [act] are severable.

9 **SECTION 22. APPLICATION TO EXISTING AGREEMENTS.** This [act] applies
10 to a collaborative law participation agreement signed after [the effective date of this [act]].

11 **Comment**

12 Section 22 is designed to avert unfair surprise, by setting an effective date that will make
13 it likely that parties took the act into account in deciding to enter into collaborative law. It
14 precludes application of the act to collaborative law pursuant to pre-effective date agreement on
15 the assumption that most of those making these agreements did not take into account the changes
16 in law. If parties to these collaborative law participation agreements seek to be covered by the
17 act, they can sign a new agreement on or after the effective date of the act.

18
19 **SECTION 23. EFFECTIVE DATE.** This [act] takes effect.....

20
21 *Legislative Note: States should choose an effective date for the act that allows substantial time*
22 *for notice to the bar and the public of its provisions and for the training of collaborative lawyers.*
23